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No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

IRENE O'CONNELL KRUSE,
Petitioner,

VS.

BANK OF AMERICA, N.T. & S.A.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION ONE

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QUESTIONS PRESENTED

1. Whether participation in an appellate review by a justice who has failed to disclose that counsel for respondent had a history of acting as attorney for the justice's family corporation, and whose family heritage and personal life are so deeply associated with respondent and its law firm that he is biased in favor of the respondent, violates the Due Process Clause of the Fourteenth Amendment.

2. Whether the bias and conflict of interest of a single justice on a panel of three violates due process and should cause the decision to be vacated.

3. Whether a deliberate and intentional refusal by an appellate court to apply standard rules of appellate review, thereby usurping the jury function to itself, and reviewing and reversing the trial court judgment on legal theories and facts different from those on which the judgment was based, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment.

4. Whether a state's failure to allow an adequate remedy for challenge and disqualification of a biased justice violates the Due Process Clause of the Fourteenth Amendment and the Supremacy Clause, Clause 2 of Article VI.

TABLE OF CONTENTS

	Page
Table of Authorities	iii-iv
Opinions and Orders Below	1-2
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2
A. Introduction	2-4
B. Statement Of Facts	4-10
C. Presentation Of The Federal Questions To The California Courts	10-11
Reasons for Granting the Writ	12-20
A. The Importance And Substantiality Of The Questions Presented	12-20
1. This Court Should Decide Whether Due Process Is Violated When A Justice Is So Biased Or Prejudiced That It Reasonably Appears He Cannot Be Fair And Impartial	13-15
2. The Effect Of Disqualification Of A Single Justice Should Be Decided And Settled By This Court	15-16
3. Due Process Is Most Certainly Violated When Bias Or Prejudice Manifests Itself In An Intentional Violation Of Procedural Rights	16-18
4. This Court Should Decide Whether Due Process Is Violated By The State's Failure To Provide An Adequate Remedy For Challenge And Disqualification Of A Biased Or Prejudiced Justice	18-20
B. The Federal Question Was Properly Raised To Confer Jurisdiction Upon This Court	20
Conclusion	20-21

TABLE OF AUTHORITIES

Cases

Page

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580 (1986) 12, 13, 15, 16, 21

Bankers Life and Cas. Co. v. Crenshaw, 56 U.S.L.W. 4418 (U.S. May 16, 1988) (No. 85-1765) 19

Berger v. United States, 255 U.S. 22, 41 S.Ct. 230 (1921) .. 16

Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 (1930) 20

Claflin v. Houseman, 93 U.S. 130 (1876) 19

Cole v. Arkansas, 333 U.S. 196, 68 S.Ct. 514 (1948) 17

Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582 (1915) 12

Hathorn v. Lovorn, 457 U.S. 255, 102 S.Ct. 2421 (1982) ... 19

In re Murchison, 349 U.S. 133, 75 S.Ct. 623 (1955) 15, 18

In the Matter of the Estate of Gilda Barberis, No. A026709 (Cal. Ct. App. 1986) 9, 10

Kaufman v. Court of Appeal, 31 Cal.3d 933, 184 Cal.Rptr. 302 (Cal. 1982) 18, 19

Kruse v. Bank of America, 202 Cal.App.3d 38 (Cal. Ct. App. 1988) 1

Kugler v. Helfant, 421 U.S. 117, 95 S.Ct. 1524 (1975) ... 14

Liljeberg v. Health Services Acquisition Corp., 56 U.S.L.W. 4637 (U.S. June 17, 1988) (No. 86-957), 108 S.Ct. 2194 (1988) 12, 13, 14, 15, 18, 19, 21

Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 19

Miller v. Municipal Court, 22 Cal.2d 818 (Cal. 1943) 19

National Union of Marine Cooks and Stewards v. Arnold, 348 U.S. 37, 75 S.Ct. 92 (1954) 12

Personnel Adm'r. of Massachusetts v. Feeney, 442 U.S. 256, 99 S.Ct. 2282 (1979) 17

Reece v. Georgia, 350 U.S. 85, 76 S.Ct. 167 (1955) 20

Sanchez-Corea v. Bank of America, 150 Cal.App.3d 202, *vacated*, 38 Cal.3d 892 (Cal. 1985) 3, 9, 17

TABLE OF AUTHORITIES

CASES

	Page
Saunders v. Shaw, 244 U.S. 317, 37 S.Ct. 638 (1917)	20
Second Employers' Liability Cases, 223 U.S. 1, 32 S.Ct. 169 (1912)	19
Spevack v. Klein, 385 U.S. 511, 187 S.Ct. 625 (1967)	17
Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80 (1972)	16
Webb v. Webb, 451 U.S. 500, 101 S.Ct. 1889 (1981)	19

Constitution, Statutes and Rules

U.S. CONST., amend. XIV, § 1	2, 10, 11, 12, 13
U.S. CONST., art. VI, cl. 2	2, 10
28 U.S.C.A. § 455 (West. Supp. 1988)	14
28 U.S.C.A. § 1257(3) (West 1966 & Supp. 1988)	2
CAL. CORP. CODE 2011(b) and (c) (Deering 1977)	4
CAL. CT. R. 23(b)	11
CAL. CT. R. 29(a)	11

Secondary Authorities

ABA Code of Judicial Conduct Canon 3C(1)(a)	14

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT, DIVISION ONE

The petitioner, Irene O'Connell Kruse, respectfully prays that a writ of certiorari issue to review the order and modified opinion of the Court of Appeal of the State of California, First Appellate District, Division One, filed June 17, 1988, on which review was denied by the California Supreme Court on September 1, 1988. The opinion of the Court of Appeal reversed an award in favor of petitioner against respondent, the Bank of America, N.T. & S.A. ("Bank of America" or "Bank").

OPINIONS AND ORDERS BELOW

The modified opinion of Division One of the First Appellate District of the California Court of Appeal reversing the judgment of the trial court is reproduced in Appendix A, and is reported at 202 Cal.App.3d 38 (Cal. Ct. App. 1988). The order of that court denying petitioner Kruse's petition for rehearing and for disqualification of the individual justices is unreported and is reproduced in Appendix B. The order of the Supreme Court of the State of

California denying review is unreported and is reproduced in Appendix C. An order of the Court of Appeal denying permission to file briefs is also unreported and is reproduced in Appendix D.

JURISDICTION

The judgment of the Court of Appeal was originally entered on May 18, 1988, and modified on June 17, 1988. A timely petition for review was denied by the California Supreme Court on September 1, 1988. This petition for certiorari was filed within 90 days of that date. Jurisdiction of this Court is invoked under 28 U.S.C.A. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

1. The Due Process Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

> [N]or shall any State deprive any person of . . . property, without due process of law. . . .

2. The Supremacy Clause (U.S. CONST., art. VI, cl. 2) provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

3. The Equal Protection Clause of the Fourteenth Amendment (U.S. CONST., amend. XIV, § 1) provides:

> [N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A. Introduction

Petitioner has learned that the Bank's outside litigation counsel in this case, Mr. David B. Flinn, and his law firm, Leland, Parachini, Steinberg, Flinn, Matzger & Melnick, have long acted

as the attorneys on behalf of the family corporation of Justice William A. Newsom, who participated on the panel of three justices who reversed petitioner's judgment.

In a public disclosure statement filed in 1982, Justice Newsom stated that he owned an interest in Squaw Valley Improvement Corporation worth between $10,000 and $100,000, which he identified as his family corporation. App. E, 48, F. On November 18, 1988, petitioner was astounded to learn that Mr. Flinn, himself, has represented Justice Newsom's family corporation, serving *as the corporation's assistant secretary*. App. G, 65. A Statement by Domestic Stock Corporation filed with the California Secretary of State's Office on behalf of Squaw Valley Improvement Corporation in June of 1982 identifies Mr. Flinn as its assistant secretary *and the agent for service of process*. App. G, 64. The address of record for Justice Newsom's company is his office at the Court of Appeal, and the company's principal executive office is listed as Mr. Flinn's law firm. App. G, 62.

In 1982-83, Justices Newsom and John T. Racanelli were assigned the appeal of a similar case against the Bank of America, *Sanchez-Corea v. Bank of America*, 150 Cal.App.3d 202, in which it had defrauded another customer of the Bank. Mr. Flinn also appeared on behalf of the Bank in that case. Justices Newsom and Racanelli voted to reverse that award, but it was reinstated by the California Supreme Court, in 38 Cal.3d 892 (1985), and a judgment for $1.0 million compensatory damages and $1.0 million punitive damages was preserved. Justices Racanelli and Newsom did not disclose any financial relationships with the Bank of America in the *Sanchez-Corea* case, nor did Justice Newsom reveal that Mr. Flinn was attorney for his family company. App. H, 66-68. Justice Newsom failed to disclose his interest in the family corporation in his 1982 or 1983 public disclosure statements, while the *Sanchez-Corea* case was pending before him. App. F, 49-58. Nor has Mr. Flinn offered to disclose, at any time, his association with Justice Newsom.

Mr. Flinn acted as counsel of record for the Bank of America in the *Sanchez-Corea* case, even though he was clearly an officer *and* the registered agent for service of process for Justice Newsom's family corporation at that time. App. I, 69. Under Califor-

nia law, Mr. Flinn continues to serve as the agent for service of process for the corporation and its shareholders, including Justice Newsom, even though the corporation was dissolved in 1983.[1]

B. Statement Of Facts

After a three-month jury trial in Sonoma County Superior Court, California, Mrs. Irene O'Connell Kruse recovered judgment in July, 1985, against the respondent Bank of America on her claims of fraud, intentional interference with prospective economic advantage, and intentional infliction of emotional distress. It was proven that the Bank intentionally and fraudulently bankrupt her family business corporation, the James E. O'Connell Company ("O'Connell Company"), and that it eliminated the O'Connell Company as competition for its major competitor, the Sebastopol Cooperative Cannery ("Sebastopol Co-Op"), while trying to salvage a $20.0 million loan which the Sebastopol Co-Op owed the Bank.

In late 1978, the Bank of America encouraged the building of and began providing construction funds for a new apple dehydration facility for the O'Connell Company.[2] The Bank had orally promised that it would provide a long-term or "takeout" loan for the project when the plant was finished. During the construction, the Bank made an additional request of Mrs. Kruse to pledge a controlling interest in the O'Connell Company to an intermediary, the George Jewell family, as a condition to the continued provision of funds for the project.[3] At the time of the request,

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[1] CAL. CORP. CODE § 2011(b) provides: "Summons or other process against such a corporation may be served by delivering a copy thereof to an officer, director or person having charge of its assets or, if no such person can be found, to any agent upon whom process might be served at the time of dissolution. . . ." Section 2011(c) provides that: "Every such corporation shall survive and continue to exist indefinitely for the purpose of being sued in any quiet title action. . . ."

[2] The cost of the facility was approximately $2.0 million.

[3] Because of a close relationship between the Jewells and the local branch manager of the Bank, the construction funds for the plant were loaned directly to Jewell, who with the knowledge and approval of the

Mrs. Kruse owned all of the stock of the company, which specialized in the production of dehydrated apple and vegetable products distributed nationwide.

Pursuant to the Bank's request, Mrs. Kruse pledged a controlling interest in her company to the Jewells for the nominal sum of $180 with an express agreement that the Jewells would return the stock for the same price when the long-term loan from the Bank of America was funded.[4] At the time of the pledge, Mrs. Kruse's controlling stock interest was worth approximately $490,000. App. A, 27.[5] During the construction, the Bank's branch manager received periodic progress reports and suggested various design changes for the plant in order to qualify it for the long-term loan. In reliance on the Bank's promise of a takeout loan, no other banks were approached. The construction was completed in mid-1979, but the Bank refused to provide the takeout financing, leaving Mrs. Kruse suddenly unable to redeem her stock ownership from the Jewells. This refusal jeopardized not only the plant, but also Mrs. Kruse's home and extensive apple orchards which were located on the company's property.

The failure to receive the long-term loan collapsed both the O'Connells and the Jewells financially. The Bank instructed George M. Jewell to liquidate the O'Connell Company, including

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Bank was, in turn, providing the construction funds to the O'Connell Company to build the new plant. The long-term loan from the Bank was supposed to be made directly to the O'Connell Company to repay the Jewells for the construction funds advanced.

[4] At the trial, the Bank denied that it had requested the stock transfer. However, all of the percipient witnesses, except the Bank witnesses, testified that the Bank had initiated the concept of the transfer and had imposed it against the wishes of both the O'Connells and the Jewells as a condition to continuation of the financing.

[5] The Bank's counsel, Mr. Flinn, recognized during the trial that the transaction was a pledge, saying: "The last element that I think is relevant to discuss with the court is damages. We haven't talked a lot about it during the sessions we've had on any legal matters on this during the evidence, but under the facts of this case it's very clear that Mrs. Kruse gave Mr. Jewell a pledge—or a mortgage of those shares. She did not sell them to him." Record at 4810:4-9.

Mrs. Kruse's home and orchards. In November of 1980, Mrs. Kruse filed an action in the Superior Court for the County of Sonoma, State of California, against the Bank of America and the Jewells. The litigation sought to enjoin the liquidation of the O'Connell properties and to recover damages on the basis that the Bank had misrepresented it would provide long-term financing and that she had transferred her stock ownership in justifiable reliance upon the Bank's representations.[6] No breach of contract cause of action was claimed by Mrs. Kruse; rather, she based her claims solely upon tort theories.

In July of 1985, a Sonoma County jury rendered a verdict in favor of Mrs. Kruse against the Bank of America in the amount of $9.445 million, which included $2.67 million in compensatory damages, $100,000 for emotional distress and $6.675 million for punitive damages. The case drew national attention, not only because of the magnitude of the award, but because it symbolized the concept that even an individual can succeed in our judicial system against an enormous economic force like the Bank of America.

Mrs. Kruse contended at trial that the Bank had never intended to give the long-term loan because of its desire to protect its $20.0 million loan to the Sebastopol Co-Op, which was on the brink of financial collapse as a result of the competitive activities of the O'Connell Company and Jewell.[7] The Bank argued at trial that it had never contractually committed to give a long-term loan and denied that the financing was refused for competitive reasons. The jury, however, found in favor of Mrs. Kruse.

The Bank moved for a new trial, which the trial judge denied on the condition that the punitive award be reduced to $1.0

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[6] The case against the Jewells was settled before trial.

[7] Also, at trial, plaintiff sought to introduce evidence from a witness who had overheard the Bank's counsel, Mr. Flinn, instruct the Bank's branch manager at a local coffee shop before his deposition to give perjured testimony by saying that he did not know about the stock pledge by Mrs. Kruse. The trial judge excluded the evidence on the ground that it would require Mr. Flinn to testify, thereby causing his recusal and a mistrial.

million. Mrs. Kruse agreed to the remittitur and judgment was entered in the total amount of $3.77 million. The Bank appealed from the reduced judgment.

The appeal was assigned to Division One of the First Appellate District of the State of California,[8] consisting of Justices Racanelli, Newsom and Norman Elkington.[9] In May of 1988, the panel rendered its decision reversing the trial court judgment on the ground that there was no substantial evidence to sustain it.[10] All three justices concurred in the opinion. In so doing, the panel recast the evidence in the light most favorable to the Bank, drew all inferences from the evidence in favor of the Bank, and ignored voluminous evidence introduced in support of the judgment.

The Court of Appeal denied a recovery to petitioner on her fraud count on the ground that there had not been a firm contract to provide the long-term financing, even though Mrs. Kruse was not seeking a recovery based on contract. App. A, 28. The court stated "The [fraud] argument falls under its own weight, the record reflecting an absence of any substantial evidence supporting *an enforceable promise* or *commitment* to lend money," App. A, 28 [emphasis added].

The court ruled as a matter of law that the Bank could not have anticipated that she would transfer her stock at such a low price,

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[8] The First Appellate District sits in San Francisco and has five divisions, with four justices assigned to each division. Three of the justices are assigned to each case. In 1984, the Bank hired former Justice Winslow Christian of the First Appellate District to act as its Director of Litigation, and subsequently placed him in charge of the *Kruse* appeal.

[9] A fourth member of the panel, the Honorable John W. Holmdahl, routinely disqualifies himself in Bank of America appeals because of work he did for the benefit of the Bank as a former state senator.

[10] The panel refused to allow the plaintiff to file a portion of her respondent's brief which raised the issue of Mr. Flinn's alleged subornation of perjury which was submitted under seal on the ground that there was no procedure for accepting briefs in such form. Upon formal motion, the court refused to allow the filing of any materials by plaintiff on this issue. App. D, 38-46.

even though it recognized that the Bank had induced her to transfer it as a pledge.[11] App. A, 27-28. The panel also held that there could be no recovery for interference with prospective economic advantage by Mrs. Kruse on the ground that a shareholder cannot seek a recovery for interference between a *shareholder* and her *corporation*, App. A, 31-32, even though Mrs. Kruse had pleaded and claimed that the interference was with the relationship between *her* and the *Jewells*, as pledgees of the stock, and not between her and the corporation. App. J, 81-83. The opinion was replete with rhetorical arguments on behalf of the Bank, and on its face did not even purport to be a fair and impartial review.[12]

Subsequent to the Court of Appeal's opinion, petitioner also learned that Justice Newsom was the grandson of William A. Newsom I, one of the early owners of the Bank of America. His percentage of stock ownership during the Bank's formative years was second only to its founder, A. P. Giannini. App. K, 87. William A. Newsom I was the Bank's first branch manager,[13] and at his death was the Chairman of the Bank's Advisory Committee. App. L, 88-89. Petitioner learned that during the conferencing sessions on the appeal, Justice Newsom had obtained a "CustomLine Preferred" line of credit from the Bank of America and had drawn over $10,000 on it.[14] App. F, 60. The "preferred"

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[11] On appeal, the Bank no longer denied the fact that it had been the motivating force for the stock pledge, but argued instead that it could not have foreseen that the transfer would be made at such an unreasonably low price and that, as a result, it could not have been the cause of the damage to Mrs. Kruse. This, of course, ignores the fact that a transfer at a nominal price for security purposes *is* a pledge.

[12] *See, e.g.*, the characterization of plaintiff's contentions as "sheer nonsense," App. A, 30, and the comment that "Perhaps all that can be said is that the axis of the financial world turns more on economic reality than human compassion." App. A, 34.

[13] The Bank of America is renowned as the originator of the branch banking system in the United States. App. K, 85-87.

[14] Justice Newsom also serves as an officer of a small, recently-formed medical foundation known as the International Bioethics Institute,

line of credit is unsecured and is designed to accommodate loans up to $50,000. App. N, 91-93.

Plaintiff moved to disqualify Justices Racanelli and Newsom on the grounds that Justice Racanelli had a financial interest in the Bank of America and that Justice Newsom was indebted to the Bank. Both justices had announced their conflict of interest in another case to which the Bank was a party, *In the Matter of the Estate of Gilda Barberis.*[15] Nonetheless, neither Justices Racanelli nor Newsom offered to disqualify themselves before deciding the Bank's appeal in this case. The same justices had failed to disqualify themselves in yet a third case, *Sanchez-Corea v. Bank of America, supra.*

Petitioner moved for a rehearing and requested that the matter be transferred to another panel. App. O, 96. But the panel denied the petition for rehearing, refused to disqualify itself and did not refer the question of its disqualification to an independent panel. App. B, 36. It instead made over 100 modifications to the opinion. App. A. Recognizing it was in error, the court changed the basis on which it had denied a fraud recovery by deleting reference to the absence of "an enforceable commitment" and substituting a new factual ground, never asserted by the Bank in the appeal, namely that there was no justifiable reliance by Mrs. Kruse. App. A, 28. The jury and trial court, of course, had found squarely the opposite.

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which has only four officers. Justice Newsom is Vice President and the Treasurer is Leland S. Prussia, who was Chairman of the Board of the Bank of America at the time of trial and while the appeal was pending. App. M, 90.

[15] In *In the Matter of the Estate of Gilda Barberis*, No. A026709, slip op. at 3 (Cal. Ct. App. 1986), the Bank of America was acting as a testamentary Trustee. The trial court, over the objection of the Bank, had dissolved a trust in favor of the beneficiary and the issue was whether the Bank should reimburse the beneficiary for attorneys' fees. On appeal, the same panel as in this case ruled in favor of the Bank. At the oral argument, Justice Racanelli volunteered that he had a financial interest in the Bank of America. App. P. Although Justice Newsom revealed the existence of "a loan," he did not reveal the pervasive extent of his relationships with the Bank.

Mrs. Kruse next petitioned the Supreme Court of the State of California for review, pleading all grounds for disqualification known at that time, including violations of due process and equal protection under the Fourteenth Amendment and that the Supremacy Clause requires a state court to conduct a review of federal constitutional issues. Petitioner filed declarations of three independent attorneys who had heard Justices Racanelli and Newsom offer to disqualify themselves in the *Barberis* case. App. P, 104-110. On September 1, 1988, the Supreme Court of California denied the petition for review without opinion. It also denied the application to take evidence, stating that Mrs. Kruse had "not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law." App. C, 37. In November of 1988, petitioner learned of Justice Newsom's long association with the Bank's outside counsel in this case.

This petition follows.

C. Presentation Of The Federal Questions To The California Courts

Petitioner had no opportunity to raise the federal questions to the Court of Appeal itself because the request for disqualification was neither responded to nor ruled upon until June 17, 1988. On that date, the California Court of Appeal simultaneously filed its order denying the request to disqualify, its order denying rehearing, and its modified opinion. Upon denying rehearing, the Court of Appeal exhausted its jurisdiction, and there were no procedural means of raising the federal questions in the Court of Appeal after that date. Only then did the federal constitutional claims and questions mature and become ripe for determination.

Therefore, the first reasonable opportunity which petitioner had for raising the federal constitutional questions was in her Petition for Review addressed to the California Supreme Court. In the Petition for Review, petitioner squarely presented her claims of violation of Fourteenth Amendment due process and equal protection rights and the Supremacy Clause. App. Q, 111-117. Counsel for petitioner did not stop with a mere pro-forma presentation of the claims. Petitioner pointed out to the court that this was not the usual case where the California Supreme Court could

rely upon California Rules of Court Rule 29(a) (see App. R, 146-147) to exercise discretion in granting or withholding review. That is because the Supremacy Clause, as interpreted by decisions of this Court (which were cited to the California Supreme Court), mandates that state courts exercise jurisdiction to enforce federal constitutional rights. Therefore, petitioner argued that the California Supreme Court should grant review of her claims of violation of those rights by the Court of Appeal.

Pursuant to Rule 23(b) of the California Rules of Court, App. R, 145-146, counsel for petitioner filed with the California Supreme Court a motion to take evidence and discovery concerning the justices' financial interests and personal bias in favor of the Bank. During the pendency of that motion and the petition for review, counsel for petitioner continued their ongoing investigation into the financial interest and bias of the justices. As additional information was obtained it was placed in supplemental pleadings and lodged with the clerk of the court, together with applications that those pleadings be filed and considered. App. Q, 118-144.

The California Supreme Court never did rule on the applications for filing supplemental briefs or pleadings. The supplemental pleadings and information, although lodged, were never filed and, presumably, were never considered by the court. Instead, the motion for an evidentiary hearing was denied by the California Supreme Court in an order filed simultaneously with the order denying review. App. C, 37. This may serve, in part, to explain the language used by the California Supreme Court in denying the motion, that petitioner had not made even a "prima facie showing of conflict of interest or bias, much less a deprivation of due process of law."

That statement was apparently made without considering the significant additional facts and evidence lodged with the court in supplemental pleadings. Further, it absolutely was made without consideration of the then unknown fact that Mr. Flinn, counsel for the Bank, was also Justice Newsom's corporate attorney. That fact was not discovered until November 18, 1988 by independent non-judicial means.

REASONS FOR GRANTING THE WRIT

A. The Importance And Substantiality Of The Questions Presented

The Due Process Clause of the Fourteenth Amendment does not require states to make any appeal procedure available; nevertheless, when an appeal procedure is provided, it is part of the "process" which must be "due" and the appellate review must be applied equally, and not arbitrarily. *National Union of Marine Cooks and Stewards v. Arnold*, 348 U.S. 37, 43, 75 S.Ct. 92, 95-96 (1954); *Frank v. Mangum*, 237 U.S. 309, 327, 35 S.Ct. 582, 587 (1915). Fairness and impartiality of the appellate justices in the state judicial systems, and whether a justice is so biased or prejudiced as to be unable to be fair and impartial, are therefore matters of vital concern and fundamental importance to this Court and the entire nation in order to ensure the impartial dispensation of justice.

In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580 (1986), this Court voiced its concern over when bias or prejudice on the part of a justice on a judicial panel rises to the level of a denial of due process, but found it unnecessary to decide the issue, leaving it for future determination. The Court also raised, but found it unnecessary to decide, the issue of whether the presence of a single disqualified justice on a panel invalidates the decision, again leaving this issue for determination in an appropriate case.

More recently, on June 17, 1988, this Court issued its decision in *Liljeberg v. Health Services Acquisition Corp.*, 56 U.S.L.W. 4637 (U.S. June 17, 1988) (No. 86-957), 108 S.Ct. 2194. The Court dealt with construction and application of the federal statute governing disqualification of trial and appellate judges for bias or prejudice which would cause a disinterested observer knowing the facts reasonably to question the impartiality of the judge. This Court was thus *not* called upon specifically to determine the issue of when bias or prejudice rises to the level of a denial of due process. Nevertheless, the Court voiced its continuing grave concern over this issue by citing *Aetna, supra*, in a footnote, and stating that this concern over bias and prejudice of

judges and justices "has constitutional dimensions," thus foreshadowing decision of this issue in a future case, such as this one. 56 U.S.L.W. at 4642, 108 S.Ct. at 2205 n.12.

We submit there could be no more compelling and appropriate case than the present one for the resolution of these basic issues, that is: (1) when bias and conflict of interest can be said to violate due process, (2) whether the presence of a single disqualified justice on the panel invalidates the decision, and (3) resolution of the related issues raised in this petition.

1. This Court Should Decide Whether Due Process Is Violated When A Justice Is So Biased Or Prejudiced That It Reasonably Appears He Cannot Be Fair And Impartial

The Due Process Clause is a bulwark of protection against prejudicially unfair state action, including judicial action. Here, with the evidence presently available, at least one of the three justices on the panel that reversed petitioner Kruse's judgment, Justice Newsom, had such a close legal, business and personal relationship to the appellant Bank of America, including the fact that the Bank's trial and appellate counsel was his undisclosed corporate attorney, that the inescapable conclusion is that Justice Newsom was strongly biased in favor of the Bank.

The Court of Appeal violated the procedural due process rights of petitioner on the appeal by reviewing and reversing the judgment on different legal theories than those on which it was based, by viewing the evidence and inferences not in the light most favorable to the judgment, but rather most favorable to the Bank, and by substituting its judgment on the facts for the jury's. No disinterested observer, knowing all of these facts, could fail to entertain a reasonable doubt as to the inability of Justice Newsom, or the panel, to be fair and impartial.

The implication of the Court's opinion in *Aetna* and *Liljeberg* is that there is a need for an objective evidence test and workable rule of law that can be formulated and applied to determine when the purely subjective state of mind known as bias or prejudice can be equated with a violation of due process. We submit that the Court's task in formulating such an objective evidence test is a

simple one; the Court need only adopt the objective test announced in the American Bar Association Code of Judicial Conduct, Canon 3C(1)(a) (1980), which reads in pertinent part:

> Judges should disqualify themselves in a proceeding in which . . . their impartiality might reasonably be questioned, including but not limited to instances where:
>
> a. The judge has a personal bias or prejudice concerning a party. . . .

This objective standard was adopted by the American Bar Association only after a special committee, chaired by former California Chief Justice Roger Traynor, had sought and considered the views of the bench and bar and other interested persons throughout the nation. Thereafter, the California Judges Association adopted the code, and in 1974 Congress incorporated this objective test into 28 U.S.C.A. § 455 (West Supp. 1988) which was the basis of the Court's decision in *Liljeberg*, 56 U.S.L.W. 4637, 4640, 108 S.Ct. 2194, 2201 n.7.

Thus, the objective test stated in the ABA Canon and the federal statute, as noted in *Liljeberg*, is the presence of "facts that might reasonably cause an objective observer to question [the judge or justice's] impartiality." 56 U.S.L.W. at 4642, 108 S.Ct. at 2205. This Court has already indicated its approval of a substantially identical objective test in *Kugler v. Helfant*, 421 U.S. 117, 130-131, 95 S.Ct. 1524, 1534 (1975).

While the discussion in *Liljeberg* was in terms of the existence of a financial interest on the part of Judge Collins, it should be noted that he did *not* actually have a personal financial interest in the outcome of the case; rather, he was a trustee of a university which had a direct pecuniary interest in the outcome. Therefore, strictly speaking, *Liljeberg* involved a question of *bias* of Judge Collins in favor of the university which was to benefit from the disposition of the case. While the question of bias, without a direct pecuniary interest, was discussed in *Liljeberg*, there is no opinion yet issued by this Court which defines the degree of bias or prejudice required to reach the due process dimensions of the Fourteenth Amendment.

Justice Black, writing for the Court in *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625 (1955), stated:

> But our system of law has always endeavored to prevent even the probability of unfairness. To this end no man can be a judge in his own case and no man is permitted to try cases where he has an interest in the outcome. That interest cannot be defined with precision. *Circumstances and relationships must be considered.* [Emphasis added.]

The circumstances and relationships in our case, where Justice Newsom is so aligned with the Bank of America and opposing counsel as to be obviously partial and biased, rise to the level of a violation of due process. Further, it is respectfully submitted that it is absolutely necessary for the guidance of state courts to specify a workable formula for measuring the contours of the alleged judicial due process violation in each instance.

In *Liljeberg*, Justice Stevens found it "inexcusable" that the judge would not disclose his bias in favor of the university of which he was a trustee. 56 U.S.L.W. 4637, 4643, 108 S.Ct. 2194, 2207. In that case, the bias would, at worst, cause one of the two competing entrepreneurs in the lawsuit to lose in the race to make a business profit. By contrast in the present case, the bias in favor of the Bank of America resulted in a decision condoning the Bank's fraudulent and outrageous financial destruction of petitioner's entire net worth and life savings.

2. The Effect Of Disqualification Of A Single Justice Should Be Decided And Settled By This Court

This case squarely raises the issue of whether the participation by one biased justice on a panel of three invalidates the decision, even though the biased justice did not cast the deciding vote. In *Aetna*, concurring Justice Brennan took pains to point out his belief that the majority opinion should not be read to imply that having only a direct substantial pecuniary interest, or casting the deciding vote, would "taint the judge's participation as a due process violation." 475 U.S. 813, 829, 106 S.Ct. 1580, 1589. As Justice Brennan states, the participation of an interested or biased member "*necessarily* imports a bias into the deliberative process" which "deprives litigants of the assurance of impartiality that is

the fundamental requirement of due process." *Aetna, supra*, 475 U.S. at 831, 106 S.Ct. at 1590 [emphasis in original].

Concurring Justices Blackmun and Marshall were equally emphatic in stating their opinion that a due process violation does not turn upon casting the deciding vote because experience teaches that each member of the panel's involvement in the deliberative process plays a part in shaping the court's ultimate disposition. *Aetna, supra*, 475 U.S. at ____, 106 S.Ct. at 1591. As the Court has long recognized in *Berger v. United States*, 255 U.S. 22, 36, 41 S.Ct. 230, 234 (1921), "nothing can be more elusive of estimate or decision than a disposition of a mind in which there is a personal ingredient."

Accordingly, we submit that Justice Newsom's participation in the deliberative process violated plaintiff's due process rights, even though the other two members of the panel voted for the reversal, and that this case presents the opportunity for this Court to so rule.

3. Due Process Is Most Certainly Violated When Bias Or Prejudice Manifests Itself In An Intentional Violation Of Procedural Rights

We submit that an alternative objective test would exist when bias or prejudice manifests itself in the form of an intentional violation of procedural rights of a party which is apparent in the decision-making process itself. There is no question that Justice Newsom knew of his family's financial heritage and of his own preferred loan with the Bank of America, and that counsel opposing petitioner was also his corporate attorney at the time that he participated in this case.

The rationale underlying the rule that a substantial financial interest in the outcome is disqualifying is that such interest presents "a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Aetna*, 475 U.S. 813, 825, 106 S.Ct. 1580, 1585, quoting *Ward v. Village of Monroeville*, 409 U.S. 57, 60, 93 S.Ct. 80, 83 (1972). If this is so, certainly, objective evidence that the level of temptation from a proven bias or prejudice has risen so high that the justice has *actually acted unfairly* should establish the denial of due process.

Here, where Justice Newsom is shown to be biased *and* the panel prejudicially violates even one procedural right of a party, as in this case, by refusing to apply the required standards of appellate review, a violation of due process occurs. Here, the most graphic illustration of a violation of procedural rights on appeal is reviewing and reversing on legal theories and issues *different* from those on which the case was tried. This is such a serious violation of rights as to be in and of itself a violation of due process. As stated in *Cole v. Arkansas*, 333 U.S. 196, 202, 68 S.Ct. 514, 517 (1948):

> To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised [on appeal] on consideration of the case as it was tried and as the issues were determined in the trial court.

The rule is the same in civil cases. *Spevack v. Klein*, 385 U.S. 511, 518, 87 S.Ct. 625, 629 (1967).

In the present case, the Court of Appeal insisted that petitioner's fraud cause of action was a breach of contract cause of action, and reversed her judgment for fraud on the ground that the evidence was insufficient to prove breach of contract. By an equally unjust substitution of theories, the Court of Appeal reversed petitioner's judgment on each of her three causes of action. A violation of due process is inherent here because the bias has been manifested in the decision itself, directly to the prejudice of the petitioner.

This Court has not previously considered and ruled upon the issues of whether it is a denial of equal protection to intentionally refuse to view the evidence and inferences in the light most favorable to the judgment. But since the panel in question has on a previous occasion failed to apply the appellate standards of review in another Bank of America case, *Sanchez-Corea, supra*, and has failed to disqualify itself as required by law, there is a pattern of denial of equality in the application of appellate standards in the Bank of America cases referred to this panel. *See, e.g., Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 272-73, 99 S.Ct. 2282, 2292-93 (1979). Petitioner respectfully submits that the Court should review this case to make a full and

complete exposition of the law on constitutional requirements for a fair and impartial appellate review.

4. This Court Should Decide Whether Due Process Is Violated By The State's Failure To Provide An Adequate Remedy For Challenge And Disqualification Of A Biased Or Prejudiced Justice

A challenged justice or panel should not pass upon its own disqualification grounds or else a flagrant violation will occur of the rule that "no man can be a judge in his own case." *In re Murchison*, 349 U.S. at 136, 75 S.Ct. at 625. Justice Stevens recognized the inherent unfairness of a judge passing on his own disqualifications in *Liljeberg* when he noted that a full disclosure by Judge Collins "would have made it possible for a different judge to decide whether the interests—and appearance—of justice would have been served by a retrial." 56 U.S.L.W. 4637, 4643, 108 S.Ct. 2194, 2205. Or, as Chief Justice Rehnquist noted in his dissent in that case, the new federal law was designed to eliminate the unfairness of a judge subjectively passing on his own disqualification grounds so that "no longer was disqualification to be decided on the basis of the opinion of the judge in question . . ." 56 U.S.L.W. 4637, 4644, 108 S.Ct. 2194, 2209. But a subjective standard of review remains where a judge or panel determines its own bias or prejudice, and if the panel is indeed prejudiced, why would its judgment of itself suddenly become neutral?

The problem is well-illustrated in *Kaufman v. Court of Appeal*, 31 Cal.3d 933, 184 Cal.Rptr. 302 (Cal. 1982). There, a California Court of Appeal justice was challenged for bias. The Chief Justice of the California Supreme Court assigned a retired justice of the Supreme Court to sit on the Court of Appeal and conduct a hearing, who found that the challenged Court of Appeal justice was biased and therefore was disqualified. Upon writ of petition by the disqualified justice to the California Supreme Court, that Court annulled the findings and order of disqualification, and the litigants were forced to proceed with appellate proceedings participated in by a justice who had been found to be unable to be fair and impartial.

The California Supreme Court openly admits that it was reaching that patently unfair conclusion because of the lack of any statutory or case law guidance as to whether due process requires that the challenge be heard by another justice or justices. *Kaufman, supra*, 31 Cal.3d at 940 n.5. That is the very guidance which we submit this Court should give and make binding under the Supremacy Clause.

Even if another justice or panel of justices passes upon a challenge, due process is still denied if the challenged justice is not required to make full and complete disclosure of all facts bearing upon the alleged interests, bias or prejudice, and the challenging party is denied the opportunity to have discovery and an evidentiary hearing. Due process continues to be denied if the appellate court has jurisdiction to review the issue, but refuses to allow any form of discovery or evidentiary hearing when faced with a justice who remains silent, as Justice Newsom has in this case.

This Court has imposed upon petitioners in cases such as this a duty to raise federal constitutional claims in the state-court proceedings before this Court can act. *Bankers Life and Cas. Co. v. Crenshaw*, 56 U.S.L.W. 4418, 4420 (U.S. May 16, 1988) (No. 85-1765); *Webb v. Webb*, 451 U.S. 500, 101 S.Ct. 1889, 1893 (1981). Concomitant to the petitioner's duty to comply with the "not pressed or passed upon below" rule should be a duty on the part of the state court to review the federal constitutional question when it is "pressed." We submit that the state appellate courts have a duty to conduct a *meaningful* review of the constitutional issues presented by petitioner "in the first instance" and that this duty has long been recognized in decisions of this Court. *Hathorn v. Lovorn*, 457 U.S. 255, 269, 102 S.Ct. 2421, 2430 (1982); *Second Employers' Liability Cases*, 223 U.S. 1, 58, 32 S.Ct. 169, 178 (1912); *Claflin v. Houseman*, 93 U.S. 130, 136-37 (1876); *Martin v. Hunter's Lessee*, 1 Wheat. 304, 339 (1816); *see also, Miller v. Municipal Court*, 22 Cal.2d 818, 851 (Cal. 1943); *Liljeberg, supra*, 56 U.S.L.W. 4637, 4645, 108 S.Ct. 2194, 2210 (O'Connor, J., dissenting—"I believe the issue should be addressed in the first instance by the courts below").

This Court has held that when a constitutional right exists, due process demands that a procedural opportunity be given to enforce that right, by presentation of evidence at a hearing. *Reece v. Georgia*, 350 U.S. 85, 89, 76 S.Ct. 167, 170 (1955); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S 673, 678, 50 S.Ct. 451, 453 (1930). The California courts have totally denied that opportunity to petitioner by refusing to allow any discovery or evidentiary hearing when faced with a judge who remains silent.

B. The Federal Question Was Properly Raised To Confer Jurisdiction Upon This Court

Where the federal question arises from a "surprise" decision of a state appellate court so that there is no earlier opportunity to present the question and have it decided in that Court, then the question may properly first be presented in a petition for rehearing. *Saunders v. Shaw*, 244 U.S. 317, 320, 37 S.Ct. 638, 640 (1917). It follows that where the federal questions arise out of the conduct of the Court of Appeal during the pendency of a petition for rehearing, and do not mature or become ripe for determination until denial of rehearing, as in this case, the federal questions necessarily can only be first raised in the next higher court with review jurisdiction. This was done here, by raising the federal questions in the Petition for Review by the California Supreme Court.

CONCLUSION

> Let reverence for the laws be breathed by every American mother, to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in Primmers [sic], spelling books, and in Almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in halls of justice. And, in short, let it become the *political religion* of the nation.

[Abraham Lincoln, from a speech to the Young Men's Lyceum of Springfield, January 27, 1838.]

There is more to be gained by making the legal system respected than is gained by making the banking industry protected. This case presents manifest violations of due process

wherein the means utilized were justified by the ends to be obtained. The judiciary and bar will both be served by a decision which formulates guidelines for the application of due process under circumstances where judges are biased or have a conflict of interest. This case presents the logical next step after *Aetna* and *Liljeberg* to formulate such guidelines for our judicial system and at the same time vacate a decision which has become a showcase of unfairness which, if left standing, can only discredit the judicial system. The petition should be granted and these questions be set for plenary consideration.

Respectfully submitted,

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Dated: November 30, 1988

APPENDIX

Table of Contents

		Page
A	Modified Opinion of California Court of Appeal filed June 17, 1988	1-35
B	Court of Appeal Order Denying Rehearing and Disqualification dated June 17, 1988	36
C	California Supreme Court Order Denying Evidentiary Hearing and Review dated September 1, 1988	37
D	Application to File Brief Under Seal dated April 30, 1987 and Orders Related Thereto	38-46
E	Statement of Economic Interest, William A. Newsom, filed May 10, 1982	47-48
F	Additional Statements of Economic Interest, William A. Newsom	49-60
G	Statement by a Domestic Stock Corporation, filed June 25, 1982, Squaw Valley Improvement Corp.	61-65
H	Declaration of Lucille Sanchez-Corea, dated July 14, 1988	66-68
I	MDC (Lexis) Release, Squaw Valley Improvement Corp.	69-71
J	Third Amended Complaint, dated July 15, 1985	72-84
K	Excerpts from *Biography of a Bank*, M.J. and B.R. James (1954)	85-87
L	Newspaper Article, *San Francisco Chronicle*, October 19, 1933	88-89
M	Newspaper Article, *The Ark*, November 2, 1988	90
N	Newspaper Article, *Newsfront*, Bankamerica Corporation, June 27, 1988	91-93
O	Memorandum of Points and Authorities in Support of Rehearing and Disqualification, dated June 10, 1988	94-103
P	Declarations of Attorneys Dolly Ares, Calvin F. Gunn and Guity Deyhimy	104-110
Q	Excerpts from Briefs filed with California Supreme Court Raising Constitutional Issues	111-144
R	Rules 23(b), 29(a) and 41 of California Rules of Court	145-148

APPENDIX A

Certified for Publication

In the Court of Appeal of the State of California

First Appellate District

Division One

AO 33064, AO 39161
(Sonoma County Super.
Ct. No. 112439)

Irene O'Connell Kruse,
Plaintiff and Appellant,

v.

Bank of America,
Defendant, Cross-Defendant and Appellant;

Charles Duck, as Trustee, etc., et al.,
Cross-Complainants and Appellants.

Order Modifying Opinion
and Denying Rehearing

[Filed June 17, 1988]

THE COURT:

It is ordered that the opinion filed herein on May 18, 1988, be modified in the following manner:

Deletions are indicated by strike-throughs, and insertions are underlined. Additions and deletions of footnotes throughout will require renumbering of footnotes.

The petitions for rehearing are denied.

Racanelli, P. J.

In the Court of Appeal of the State of California
First Appellate District
Division One

AO 33064, AO 39161
(Sonoma County Super.
Ct. No. 112439)

Irene O'Connell Kruse,
Plaintiff and Appellant,

v.

Bank of America,
Defendant, Cross-Defendant and Appellant;

Charles Duck, as Trustee, etc., et al.,
Cross-Complainants and Appellants.

INTRODUCTION

The underlying litigation arises out of a series of related loan transactions involving apple growers and processors and the Bank of America (Bank) under the evolving theories of lender liability. Following a three-month trial, the jury returned a verdict against the Bank and in favor of plaintiff and cross-complainants aggregating $20,020,000 in compensatory damages and $26,675,000 in punitive damages.

The trial court granted the Bank's motion for a new trial as to punitive damages only, conditioned on plaintiff's and cross-complainants' acceptance of a remittitur to $6 million in punitive damages; the remittitur was duly accepted. The Bank appeals, contending, inter alia, that no basis for liability for damages has been shown. Plaintiff and cross-complainants have cross-appealed seeking to reinstate the full award of nearly $47 million and to recover counsel's travel expenses.

FACTUAL BACKGROUND

Viewing the evidence, as we must, in a light most favorable to the judgment (*Nestle v. City of Santa Monica* (1972) 6 Cal.3d

920, 925-926), we narrate the factual background in some detail in order to discuss adequately the several issues raised in this extensive litigation.

George M. Jewell,[1] like his father before him, has been a well established apple grower in the Sebastopol area for many years. By the early 1960's, George M. Jewell had developed an apple brokerage business, operated as a joint venture with his son, George R. Jewell. In addition to apples grown on their own ranch, the Jewells bought and collected apples grown by independent growers for sale to processing plants producing apple juice, dehydrated apples, applesauce, vinegar and other kindred products. At this time, about 80 percent of the apples harvested in the Sebastopol area were sold for processing purposes, and the remaining crop yield marketed as fresh fruit.

The two major apple processors in Sebastopol were the family-owned James O'Connell Company and the Sebastopol Cooperative Cannery ("Co-op"). The Co-op processed apples grown by its members but also purchased apples from non-members or "independents" whenever the supply of apples from its members was inadequate. The Jewells had supplied apples to the O'Connell Company, the principal Sebastopol outlet for independent growers, for a great many years.

1. *The Near Collapse of the O'Connell Company*

James O'Connell died in 1971, and his widow, Mrs. Irene (O'Connell) Kruse became the sole owner of the family corporation. Management of the business operations was entrusted to her 19-year-old son, Dan O'Connell.

The O'Connells had been long-standing customers of the local Bank, which had consistently funded their yearly operation. But in 1974, the Bank suddenly denied Dan O'Connell's request for a capital improvement loan for the O'Connell Company's processing plant. The following year, much to O'Connell's surprise, the

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[1] For ease of reference, the respective parties will be designated by their proper names unless otherwise indicated. Since the interests of the senior Jewells and the trustee-in-bankruptcy are identical, we will refer herein only to the former.

Bank refused to provide the customary annual line of credit to fund the company's business operations. William (Bill) Sullivan, the manager of the Bank's Sebastopol branch, extended some interim relief in the form of overdraft privileges approved as short-term loans secured by inventory and receivables; but without the annual loan funds, the O'Connell Company was soon unable to pay its creditors.

In April and May 1975, the Taylor-Doyle Company, one of O'Connell's major suppliers, obtained two judgments against the O'Connell Company for the sale of apples.[2] A sheriff's sale was scheduled in January 1976 to liquidate the O'Connell properties to satisfy the unpaid judgments.

Sometime during the summer of 1975, the Jewells learned of Dan O'Connel's business plight. Acting upon his son's suggestion, George M. Jewell agreed to assist O'Connell financially. In addition to his interest in keeping "a port open" for his suppliers, the independent growers, Jewell also wanted to aid his fellow farmer.[3]

The Jewells were themselves long-standing customers of the Bank. George M. Jewell spoke to Bill Sullivan and told him of his desire to assist O'Connell. Sullivan soon arranged to lend George M. Jewell $150,000, which he could, and did, in turn loan to the O'Connell Company to discharge the unpaid judgments and to settle other pressing debts. On Sullivan's advice, Jewell obtained a promissory note for the $150,000 loan secured by a second deed of trust on the O'Connell property. (The Bank held the first deed of trust securing an earlier outstanding loan.)

Later that same year (1976), Jewell borrowed an additional $114,000 from the Bank to lend to the O'Connell Company to finance an equipment purchase; that loan was secured by another

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[2] The Taylor-Doyle lawsuits were initiated after Sullivan revealed to a company director (also a bank officer) that the Bank had withdrawn its financing of the O'Connell Company.

[3] The Jewells were instrumental in setting up an informal trust fund for the O'Connell Company with contributions from other farmers in the community.

(third) deed of trust. And in August 1977, Jewell borrowed another $150,000 from the Bank which he again in turn loaned to O'Connell to enable the O'Connell Company to pay off an outstanding loan owed to the Bank.

George M. Jewell provided other assistance to the troubled O'Connell Company as well: he gave financial advice; he assisted in negotiations with O'Connell's suppliers to extend terms of payment; and he began to supply the O'Connell Company with large quantities of apples on credit alone.

2. *Financing of New O'Connell Company Plant*

~~In 1977, the Co-op embarked on a major project involving construction of a large dehydration facility to accommodate the expanding market for dehydrated apples. The plans called for a new continuous belt dehydration system known as a "Proctor-Schwartz" dryer. The Bank agreed to provide the necessary construction loan and long-term financing.[3] Upon completion of the facility in 1979, the Bank had loaned the Co-op $17.7 million.~~

~~Meanwhile, in~~ By 1977, the O'Connell Company had been ordered by a state regulatory agency to make substantial improvements in its waste water treatment facilities or to cease and desist operations. Confronted with the formidable competition presented by the new Co-op dehydration plant,[4] Dan O'Connell decided to construct his own new dehydrating facility. Following O'Connell's positive discussion with George M. Jewell, the latter then discussed the idea with Bill Sullivan, who was equally enthusiastic about the proposed project. In view of the Bank's

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[3] ~~Normally, the owner of a construction project obtains commitments for both a short-term construction loan and a long-term "take-out" loan secured by the property before proceeding with the project. The Bank gave the Co-op an oral commitment for the long-term financing followed up with a written commitment.~~

[4] In 1977, the Co-op embarked on the construction of a large dehydration facility to accommodate the expanding market for dehydrated apples. The Bank agreed to provide the necessary construction loan and long-term financing. Upon completion of the facility in 1979, the Bank had loaned the Co-op $17.7 million.

unwillingness to grant any further loans to the O'Connell Company, George M. Jewell undertook responsibility to obtain the necessary financing.

In December 1977, George M. Jewell and his wife, Betty, met with Sulluvan to discuss a $1 million loan for the project, payable over 20 years and to be secured by the new O'Connell plant. The Jewells were also to obtain an additional loan from the Bank to finance a lease-purchase arrangement whereby they would personally acquire ownership of ~~the~~ a new "Proctor-Schwartz" dehydrator and lease it back to the O'Connell Company. After the December 1977 meeting, George M. Jewell believed that the Bank would provide long-term financing on the O'Connell plant. The following month, upon receiving a firmer estimate of construction costs from Dan O'Connell, George M. Jewell again met with Sullivan and told him that O'Connell would need $1.2 million. Sullivan replied that the Bank would not make the loan if Dan O'Connell remained as manager of the new plant. Reacting with surprise, George M. Jewell responded that he would not "kick Dan out of his own business."

Concluding that Bank financing was a "dead issue," the Jewells began searching for alternative financing. They were soon able to obtain a $650,000 loan for the O'Connell project from North Coast Production Credit Association (PCA) evidenced by a seven-year promissory note (repayable at $10,000 per month), the maximum terms available from PCA in a single loan. George R. Jewell agreed to, and did, pay the monthly installments to PCA on behalf of the O'Connell Company. Construction of the new plant began in May 1978.

After the Jewells obtained the PCA loan, Sullivan told George M. Jewell that "the boys down below [Sullivan's superiors in the San Francisco regional credit office] kicked their butt for not taking the whole thing." George M. Jewell interpreted the statement to mean the Bank was interested in providing a long-term loan.

George M. Jewell knew that Sullivan did not have authority to approve large loans. (Sullivan's independent lending authority was apparently limited to $100,000.) Under the Bank's regular

procedures, the branch officials were required to prepare a credit report (form CR-115) to be forwarded to the regional credit office for review and approval by an authorized credit officer.

During the early part of 1978, George M. Jewell met with Sullivan frequently to discuss the long-term financing needed for the O'Connell plant. In April 1978, Dan O'Connell began furnishing Sullivan with periodic progress reports on the construction work. Sullivan suggested various design changes for the plant to avoid its possible classification as a specialized-use building operation. Sullivan knew that the regional credit office was reluctant to finance specialized buildings not readily convertible to other uses.

In the spring of 1978, George M. Jewell applied to the Bank for a $400,000 equipment loan to purchase the Proctor-Schwartz dehydrator. During the review by the Bank's regional credit office, Sullivan's superiors requested additional information concerning Jewell's equity interest in the O'Connell Company. As a consequence, Sullivan suggested to George M. Jewell that he should acquire controlling ownership of the O'Connell Company.

The equipment loan application was delayed for several months while the question of Jewell's ownership interest was being considered by Bank officials. In August, when the Bank had yet to approve the loan application, the Jewells returned to PCA. George M. Jewell then borrowed $370,000, and his son, $130,000, to finance the purchase of the Proctor-Schwartz dryer.[5] Thereafter, the Jewells modified their loan request to the Bank, which eventually approved a loan in the amount of $209,000 for equipment purchases for the O'Connell plant.

In November 1978, Sullivan invited the Jewells to a luncheon meeting with his superior, Norman Jensen. The two Bank officers visted the O'Connell construction site; neither man expressed any reservations about financing.

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[5] In April 1978, George M. Jewell had obtained a $300,000 credit line from PCA for equipment purchases for the O'Connell plant. He in turn loaned the money to the O'Connell Company.

In December 1978, Sullivan strongly urged George M. Jewell to obtain a controlling interest in the O'Connell Company, explaining that it was becoming "difficult if not impossible" for the Bank to continue investing in the O'Connell project without Jewell possessing a controlling interest. George M. Jewell, aware of Sullivan's interest in wanting to protect himself (Jewell) and the Bank, believed that unless he had some equity ownership in the O'Connell Company, the Bank would not provide long-term financing.

On January 7, 1979, George M. Jewell met with Mrs. Kruse and her family and explained the Bank's insistence that the Jewells have a controlling interest in the O'Connell Company as a condition to the continued financing of the dehydrating plant. She reluctantly agreed ~~"to sell"~~ to transfer a majority of her stock to George R. Jewell for $180 with the expectation that the stock would be returned once the Bank funded the long-term loan enabling the O'Connell Company to repay the Jewells.

The Jewells and Dan O'Connell anticipated that the PCA construction loan, together with the equipment loans, would be sufficient to pay the costs of the dehydrating plant.[6] However, by the spring of 1979, project cost over-runs required George M. Jewell to borrow additional sums from the Bank which he then loaned to the O'Connell Company. Thus, in March 1979, he first exhausted his $650,000 annual operating line of credit, then obtained Sullivan's approval for extended credit of an additional $445,000 or a total indebtedness of $1.095 million. Sullivan told George M. Jewell that something would be "worked out" at the end of the year.

The Jewells optimistically anticipated long-term financing which would permit consolidation of the several debts under a favorable repayment schedule amortized over a 20-year period. Still, they knew Sullivan himself lacked authority to approve a loan of that magnitude.

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[6] The total funds obtained exceeded $1.6 million: the four PCA loans aggregating $1.450 million and the Bank loan of $209,000.

In April 1979, Sullivan and his regional office superior, Norm Jensen, again visited the O'Connell construction site. Well aware of Sullivan's inablilty to approve the million dollar loan package, George M. Jewell was anxious to hear Jensen's reaction. Jensen reportedly stated "it was a beautiful plant, and '~~...~~we're going to be able to help [you].' " Jewell assumed that the statement indicated that the loan would be approved.

Sullivan shared a similar optimism of eventual loan approval by the regional credit office. In May 1979, as the project neared completion, Sullivan requested an appraisal of the O'Connell plant, the first step in preparing the customary CR-115. The Bank appraisal proved too low to justify a $1.9 million loan, motivating Sullivan to urge reconsideration by his superiors.

By August 1979, however, Sullivan realized that the regional credit office would not approve the loan. Sullivan soberly informed George M. Jewell that the Bank would be unable to provide long-term financing on the O'Connell plant. Shortly thereafter, i~~I~~n ~~late~~, September 1979, Sullivan was hospitalized due to a heart ailment and ~~shortly thereafter~~ retired on disability. ~~In October 1979, his replacement, Roger Bunch, followed up on Sullivan's actions by submitting a CR-115 to the regional credit office seeking approval of a $1.9 million O'Connell loan. The Jewells were unaware of Bunch's action. The loan was never approved, and the CR-115 was returned to the local branch.~~

Meanwhile, in November 1978, George R. Jewell had opted to build a "fresh pack" plant: a facility for storing high quality apples for future sale as edible fresh fruit. However, he did not obtain conventional financing (short-term construction financing and long-term payoff ~~"take-out"~~ loan) but elected instead to use his personal resources and annual operating line of credit to fund construction. When he applied to the Bank for a long-term real estate loan, Sullivan orally assured him the loan would be approved. In October 1979, the long-term loan was in fact approved by the Bank.

3. *Events Leading to Bankruptcy*

In January 1980, Roger Bunch, who succeeded Sullivan as local branch manager, approved George M. Jewell's $900,000

annual credit line and consolidated his short-term bank debts into an $850,000 loan payable over a four-year period. Bunch asked Jewell to execute deeds of trust on the Jewell Ranch as security for the loan. Jewell refused but did, however, sign an agreement not to encumber the Jewell Ranch.

In 1980, prices of processed apple products fell dramatically, due in large measure to a 1979 bumper apple crop which created a glut on the market. The O'Connell Company sustained heavy losses that year and was unable to repay the construction loans advanced by the Jewells. The O'Connell Company was likewise unable to pay the Jewells for thousands of tons of apples supplied to the O'Connell Company for processing.[7]

By 1980, the O'Connell Company was indebted to the Jewells in the amount of $2.7 million: $1 million in loans and $1.7 million for apples supplieds. The Jewells in turn were heavily indebted to their growers, to PCA, as well as to the Bank. Bunch concluded that George M. Jewell was so deeply in debt that "he wasn't going to get out." Accordingly, in September 1980, he summoned the Jewells to his office and announced that the Bank would not lend them any more funds.

In an effort to ease his financial dilemma, George M. Jewell agreed to place two "satellite" parcels of the Jewell Ranch on the market. His attempts to obtain financing from other lenders proved unsuccessful in view of the existing agreement not to encumber the Jewell Ranch. By November 1980, the O'Connell Company plant, along with the Proctor-Schwartz dryer owned by the Jewells, was placed on the market for liquidation.

On November 5, 1980, the Jewells responded to an invitation to meet with PCA and Bank officials in San Francisco. At the meeting, attorneys for PCA and the Bank strongly insisted that

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[7] George M. Jewell's long-standing commitment to pay his growers at the prices posted earlier in the season produced a negative spiral effect: the Jewells' commitment to pay their growers above-market prices resulted in commensurately higher costs of supplies to the O'Connell Company now controlled by the Jewells.

the Jewells liquidate their properties in order to repay the outstanding loans or risk foreclosure proceedings.

George M. Jewell broke down emotionally prompting Bunch to put his arm around him with the verbalized assurance, "'Don't worry, George, we'll take care of you.'" During the return trip to Sebastopol, Bunch told George M. Jewell that if he would give the Bank deeds of trust on the Jewell properties as well as the proceeds derived from the sale of properties, the Bank would in turn pay the growers and protect him from the demands of PCA. A few days later, George M. Jewell and his wife executed and delivered to the Bank deeds of trust to all their real property and security agreements on their equipment.

Although the Bank never initiated foreclosure proceedings on the Jewell properties, it did insist that the Jewells liquidate the O'Connell properties to provide funds to pay off the outstanding bank loans. Meanwhile, PCA also began pressing its demands on the Jewells and the O'Connell Company for immediate payment of the outstanding unpaid loans. Indeed, PCA threatened to file a petition for involuntary bankruptcy of the Jewells in order to invalidate the transfer of their properties to the Bank.

On November 25, 1980, Mrs. Kruse filed a fraud action against both the Jewells and the Bank seeking damages and equitable relief. Two months later, the Bank received $381,000 from the sale of the two satellite parcels and released a portion of the funds to pay the senior Jewells' attorney fees in contemplation of a voluntary reorganization petition in bankruptcy, ultimately filed by the senior Jewells on January 28, 1981. George R. Jewell filed a Chapter 11 petition the following May.

The culminated events raised doubts in the Bank officials whether to distribute the proceeds to the Jewells' creditors, including PCA and the growers, as Bunch had promised. However, the Bank eventually turned over the deeds of trust as well as the sales proceeds to the trustee-in-bankruptcy.

In July 1981, the fresh pack plant was destroyed by fire; the fire insurance proceeds were applied by the Bank to George R. Jewell's outstanding loan. The final chapter in the tragic eco-

nomic collapse was written in January 1982 when the O'Connell Company also filed bankruptcy.

DISCUSSION

The Bank's main argument on appeal is that the judgment is unsupported by the record. Accordingly, the scope of our review begins and ends with the determination whether, on the entire record, there is any substantial evidence, contraticted or uncontradicted, which will support the conclusions reached by the jury. (*Estate of Leslie* (1984) 37 Cal.3d 186, 201; *Stevens v. Parke, Davis & Co.* (1973) 9 Cal.3d 51, 64.) In reviewing the voluminous record, we must examine all factual matters in the light most favorable to the prevailing parties and resolve all conflicts in support of the judgment. (*Estate of Leslie, supra,* 37 Cal.3d 186; *Nestle v. City of Santa Monica, supra,* 6 Cal.3d 920, 925-926.)

"Substantial" evidence, however, is not synonymous with "any" evidence. To constitute sufficient substantiality to support the verdict, the evidence must be "reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." (*Estate of Teed* (1952) 11 Cal.App.2d 638, 644; see also *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164; *Yancey v. State Personnel Bd.* (1985) 167 Cal.App.3d 478, 482-483; *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873.)

As we will explain, our review of the whole record in light of such governing principles discloses an absence of proof sufficient to establish the essential elements of the asserted causes of action. Therefore, we are compelled to reverse the judgments.

I.

JEWELLS' CROSS-COMPLAINT

The Jewells' cross-complaint against the Bank asserted theories of fraud (actual and constructive) and bad faith denial of the existence of a contract. In essence, the Jewells claimed that the Bank wrongfully induced them to borrow heavily in order to

finance the O'Connell Company; that once the Jewells were hopelessly overextended, the Bank reneged on its promise to provide long-term financing to the O'Connell Company which would have enabled it to repay the Jewells; further, that after obtaining the Jewells' assets, the Bank betrayed them by failing to pay their other creditors (notably, PCA and the growers).

The jury awarded George M. and Betty Jewell $12.75 million and George R. Jewell $4.5 million in compensatory damages based upon special verdicts finding fraud and bad faith denial of a contract. The jury also awarded the Jewells $20 million in punitive damages. We will conclude the verdicts are legally insupportable.

A.

Failure to Disclose

The Jewells' claims of actual and constructive fraud rests on a theory that the Bank had a duty to disclose certain information before making the requested loans; that had the Bank made the required full disclosure, the Jewells would have refrained from repeatedly borrowing the large sums of money. Thus, they contend, the Bank's conduct in wrongfully inducing them to obtain loans while fraudulently concealing material facts constituted actionable fraud.

Ordinarily, failure to disclose material facts known only to one party is not actionable fraud unless there is a fiduciary or confidential relationship imposing a duty to disclose. (Civ. Code, § 1710, subd. (3); 4 Witkin, Summary of Cal. Law, Torts (8th ed. 1974) §§ 459-460, pp. 2724-2725.) The Bank vigorously denies the existence of any fiduciary duty or any breach thereof. Moreover, the Bank claims, any fiduciary relationship that arguably existed (see generally *Rutherford v. Rideout Bank* (1938) 11 Cal.2d 497 [bank's confidential relationship with depositer-borrower]; *Commercial Cotton Co. v. United California Bank* (1985) 163 Cal.App.3d 511, 516 [bank's "quasi-fiduciary" relationship with checking account holder]) was limited to the 1976-1977 loan transactions and terminated by reason of George M.

Jewell's exercise of his own independent business judgment and action in connection with the 1978-1979 financial transactions.

We need not navigate these murky waters. As will appear from our discussion, even assuming some duty to disclose existed, the Jewells have nonetheless failed to establish any cause of action based upon fraud.

(l) *The 1976-1977 O'Connell Loans*

The Jewells first complain that in making the loans used to save the O'Connell Company ($150,000 to satisfy the Taylor-Doyle judgments; $114,000 for equipment purchases; and 150,000 to pay an old bank debt), the Bank failed to disclose: 1) critical information regarding the O'Connell Company's banking history; 2) its low opinion of Dan O'Connell as a business manager; and 3) the benefits it derived as a result of the Jewells' loans to the O'Connell Company. Moreover, they charge, the Bank also failed to advise the Jewells to seek independent legal advice (due to the Bank's "conflicting" interests) or to inform them of the resulting impact on their own financial condition.

But there is no solid, credible evidence that the financial losses ~~any damages arguably~~ sustained by the Jewells were proximately caused by the 1976-1977 loans. The loans made were ~~adequately~~ secured by deeds of trust on O'Connell properties.[8] During the years 1976-1980, the O'Connell Company paid to the Jewells a total of $1.7 million. Of that amount, $296,000 was applied to the notes payable (which included a 1 percent surcharge over the Jewells' corresponding interest rate paid to the bank ~~debt service~~). By the end of 1977, the Jewells had fully repaid the 1976 loans and open credit lines and were only indebted for the 1977 $150,000 loan used to pay off O'Connell Company's bank loan;

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[8] As earlier noted, the first loan of $150,000 was secured by a deed of trust junior to the Bank's trust deed, ~~securing a balance of $139,000, leaving $161,000 in unencumbered value as security.~~ In August 1977, when George M. Jewell paid off the old bank loan, the Bank's senior security was extinguished.

Later, when the construction project began, the PCA loan paid off George M. Jewell's debt to the Bank, and his deed of trust was subordinated to the deed of trust held by PCA.

and that debt was cleared in March 1978. Thus, at the end of 1978, the Jewells were free from debt to the Bank except for the $209,000 equipment loan.

In point of unassailable fact, the Jewells' precarious economic condition in 1981 directly resulted from ~~several~~ significant independent intervening factors: 1) the heavy indebtedness incurred in 1978-1979 in conjunction with the construction of the O'Connell dehydrating plant; 2) the O'Connell Company's failure to repay the construction funds borrowed from the Jewells; 3) the devastating losses suffered in the 1979-1980 apple season as a consequence of paying above-market prices to their growers; 4) the O'Connell Company's failure to repay nearly $2 million owed to the Jewells for apples delivered during 1978-1980 for processing; and 5) the bankruptcy in 1980 of a major customer of the Jewells rendering a $232,000 receivable uncollectible. The record convincingly demonstrates that the 1976-1977 loans made to finance the O'Connell Company were ~~neither a contributing nor~~ not a substantial factor in the Jewells' financial collapse.

(2) *1978-1979 Loans for Plant Expansion*

In 1978 and 1979, the Jewells borrowed well over $1 million in short-term bank loans on the assumption the Bank ultimately would give a long-term loan on the O'Connell plant. The Jewells contend the Bank fraudulently induced them to undertake the short-term borrowing without disclosing the possibility ~~possible likelihood~~ that their request for long-term financing would be denied.

Our review of the record fails to disclose ~~uncover~~ evidence of sufficient substantiality to establish the essential element of justifiable reliance.[9] Testimony concerning one's own reliance is le-

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[9] We find the Jewells' companion argument of culpable nondisclosure of a May 1978 internal report predicting a decline in apple acreage in Sonoma County somewhat ingenuous. Jewell's testimony that had he known of this report, he would never have become involved in the O'Connell project, defies ~~lacks~~ credibility.

The report cited the same statistics contained in an earlier report that Jewell read. The first report, however, explained why those statistics were misleading in that new plantings made the yield per acre greater

gally insufficient evidence if such reliance is without justification (Prosser & Keeton, The Law of Torts (5th ed. 1984) § 108, p. 750); a party plaintiff's misguided belief or guileless action ~~mindless conduct~~ in relying on a statement on which no reasonable person would rely is not justifiable reliance. (*Ibid.*) "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied recovery." (*Seeger v. Odell* (1941) 18 Cal.2d 409, 415; see also *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 5603.) Quite simply, the Jewells' hopeful expectations cannot be equated with the necessary justifiable reliance.

When the Bank in January 1978 denied the Jewells' request for long-term (construction) financing on the O'Connell plant, they went elsewhere (to PCA). Certainly, the Jewells were aware there could be no assurance that any of their requests to the Bank for long-term financing would be granted.

Moreover, George M. Jewell knew of Sullivan's limited lending authority and that his request for such a large loan required the approval of Sullivan's superiors. Obviously, knowledge that the loan request required such approval implies an awareness that any such request could be denied. It follows, inescapably, that Jewell could not have reasonably relied on the Bank's failure to disclose that the loan might be denied.[10]

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and land use restrictions protected agricultural land. It is unreasonable to think that the Jewells' enthusiasm and confidence about the O'Connell dehydrating plant would have been shattered by the conclusory statement in the second report that Sonoma County would likely "lose some additional apple acreage during the next 5 years," particularly where the first report noted the same reduction in acreage but explained a favorable outlook for an increased apple supply.

[10] As one of its claims of error, the Bank underscores the trial court's effective deletion of the requirement of justifiable reliance in the jury instruction given, viz: "Where there is a fiduciary relationship, the one to whom the fiduciary relationship, the one to whom the fiduciary relationship is owed has the right to rely on the representation made to him by the fiduciary without the duty of further inquiry."

We agree that this instruction erroneously permitted the jury to find fraud even though George M. Jewell knew Sullivan lacked authority to

The Jewells seek to support a finding of reliance by pointing to Jensen's April 1979 site visit and saccharine comments which, they claim, lulled them into a false sense of security and created an obligation in Jensen to dispel any illusion that the loan would be forthcoming.

Yet by April 1979, construction on the O'Connell plant was nearly completed. Given the Bank's earlier refusal to finance the O'Connell plant and the Jewells subsequent recourse to the seven- year loan obtained from PCA, the Jewells' assertion—that they would have avoided any financial entanglement in the O'Connell construction had they known long-term financing might be denied—cannot be logically accepted. Indeed, actual construction of the dehydrating plant began in May 1978, notwithstanding the fact that long-term financing had not yet been procured.

The Jewells further claim they reasonably believed an "oral" commitment had been made, especially in light of the Bank's prior oral commitments to the Co-op and to George R. Jewell, followed up with long-term (take-out) loans. But there is no evidence the Jewells even knew of the oral commitment made to the Co-op. And the financing on the fresh pack plant occurred in October 1979, after the Jewells were informed a long-term loan on the O'Connell plant would not be made.[11]

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commit to long-term financing. The correct rule charges the beneficiary of a fiduciary relationship with investigating facts of which he has actual notice. (*Miller v. Bechtel Corp.* (1983) 33 Cal.3d 868, 875; *Bedolla v. Logan & Frazer* (1975) 52 Cal.App.3d 118, 131, fn. 12.)

[11] Nor could it be argued that the Bank's silence deterred the Jewells from seeking financing alternatives. As noted, in August 1979, Sullivan told George M. Jewell the Bank would not grant a long-term loan. But it was not until a year later (October 1980) that the Jewells began to investigate alternative resources for the required financing. By then, their negotiating position was considerably weakened: they had lost their security, their deeds of trust on the O'Connell properties having been assigned to the Bank in connection with the $850,000 loan to George M. Jewell, and the Jewells had also signed the non-encumbrance agreement thereby effectively eliminating their ranch property as loan collateral.

~~Nor can the Jewells successfully argue the Bank's silence deterred them from seeking financing alternatives. In August 1979, Sullivan told George M. Jewell the Bank would not grant a long-term loan. But it was not until a year later (October 1980) that the Jewells began to investigate alternative resources for the required financing. By then, their negotiating position was considerably weakened: they had lost their security, their deeds of trust on the O'Connell properties having been assigned to the Bank in connection with the $850,000 loan to George M. Jewell, and the Jewells had also signed the non-encumbrance agreement thereby effectively eliminating their ranch property as loan collateral.~~

(3) *Jewells' Ranch Loan*

The Jewells further posit their claim of fraudulent inducement to engage in short-term borrowing on the Bank's alleged promise to make a long-term loan secured by the Jewells' ranch, if ever necessary. They construct their ancillary claim largely on statements made by Sullivan to George M. Jewell assuring such possibility, first in August 1977, when George M. Jewell borrowed $150,000 from the Bank to pay off the O'Connell Company's old bank debt; and again in December 1977, when the two men were discussing the probable terms of a long-term loan on the O'Connell plant.

Assuming the substance of Sullivan's statements could arguable be construed as positive assurances, again we find the evidence of justifiable reliance wholly insufficient. When discussions resumed in 1978 concerning long-term financing for the O'Connell plant, Sullivan openly suggested the use of the ranch as security. George M. Jewell ~~flatly~~ refused, saying he did not owe the apple industry that much. In 1980, when Bunch arranged the consolidated $850,000 four-year loan, Bunch made a similar suggestion which the Jewells ~~again refused~~ rejected because that loan was not the long-term loan they desired. Finally, at the time a short-term loan was arranged for the Jewells to pay their growers, Bunch discussed the possibility of taking the Jewell ranch for collateral and was again met with an emphatic "no." George M. Jewell's persistent refusal to encumber the Jewell ranch ~~itself~~ belies the claim now asserted that the Jewells would not have undertaken the initial borrowing if they had known they

could not thereafter obtain new financing secured by the ranch ~~alone.~~

Moreover, it is clear from the record that it was not until 1980, *after* the Bank cut off any more unsecured loans, that the Jewells attempted to obtain a real estate loan on the Jewell Ranch. By then, of course, their circumstances had changed dramatically. By the end of 1977, the Jewells' only outstanding indebtedness to the Bank was the $150,000 loan used to pay off the O'Connell Company's bank loan. By 1980, in marked contrast, the Jewells' financial outlook was bleak indeed: not only did they owe the Bank over $1.3 million, they also owed PCA $1 million and their apple growers $985,000. As of January 1980, the Jewell Ranch was valued at $1.337 million.[10]

Obviously, by that time, the Bank had decided it was not willing to lend any more funds to the Jewells. The Jewells could not reasonably have expected that the Bank's promise or assurances of a loan secured by the Jewell Ranch would extend indefinitely, notwithstanding such a staggering debt pricture.

B. *Denial of Long-Term Financing*

The Jewells' principal grievance against the Bank is its refusal to come to their financial rescue by providing long-term financing. the Bank's failure to do so, they strongly argue, constituted a bad faith denial of a contract. This theory of liability is equally devoid of supporting evidence in the record before us.

Tort liability based on bad faith denial of a contract was first recognized in *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1983) Cal.3d 752. Our highest court, while reiterating established principles governing a breach of the covenant of good faith and fair dealing in the context of a contract remedy, declined to rule on the question whether such breach gave rise to a tort

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[10] The Jewells also owned equipment and inventory, giving them a net worth of $4 million. But the value of their real estate did not approach the level of their indebtedness.

action in the contex: of an ordinary commercial contract.[11] Instead, the court fashioned a distincly different form of relief: "a party to a contract may incur tort remedies when, *in addition to breaching the contract* it seeks to shield itself from liability by denying, in bad faith and without probable cause, that the contract exists." (36 Cal.3d at 769, emphasis added.)

Thus, the cause of action in tort arises when the party not only breaches the contract but also denies in bad faith that a contract even exists. The inherent precondition to such a tort claim is the existence and breach of an enforceable contract. (See *Palmer v. Ted Stevens Honda, Inc.* (1987) 193 Cal.App.3d 530, 538-539; *Malmstrom v. Kaiser Aluminum & Chemical Corp.* (1986) 187 Cal.App.3d 299, 321.)

In *Seaman's,* there was no question that a valid (dealership) contract had been formed. The Pivotal circumstance underlying the tortious conduct was the "contracting party seeking to avoid all liability on a meritorious contract claim by adopting a 'stone-wall' position ('see you in court') without probable cause and with no belief in the existence of a defense. Such conduct goes beyond the mere breach of contract. It offends accepted notions of business ethics." (36 Cal.3d at pp. 769-770, emphasis added.)

In the subsequent cases applying *Seaman's,* the formation of a contractual relationship was *not* in dispute; rather, tort liability, where found, was based on the bad faith assertion on an invalid defense by the party in breach. (See, e.g., *Commercial Cotton Co. v. United California Bank, supra,* 163 Cal.App.3d 511 [statute of limitations asserted by Bank against checking account holder]; *Rulon-Miller v. International Business Machines Corp.* (1984) 162 Cal.App.3d 241 [~~employer's assertion of~~ false grounds asserted by employer for wrongful discharge of employee].)

But the rule announced in *Seaman's,* explicated in its progeny, is not applicable herein. There was no contract, oral or written,

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[11] More recently, the Supreme Court has declared that "not every breach of the covenant of good faith and fair dealing in a commercial contract gives rise to an action in tort." (*Kendall v. Ernest Pestana, Inc.* (1985) 40 Cal.3d 488, 497, fn. 11.)

between the Bank and the Jewells providing for long-term financing. Nor, indeed, have the Jewells alleged a cause of action for breach of contract by the Bank. Instead, they seek to impose tort liability on the Bank through the bare allegation of a bad faith *denial* of a contract. Neither the allegation nor its proof comes within the *Seaman's* contours of tort liability.

The jury was correctly instructed, and obviously found, that an underlying contract was a prerequisite to recovery. But the jury's special finding of liability on the asserted theory of bad faith denial of a contract is wholly unsupported in the record. To bolster their claim that the Bank was "committed" to a long-term loan on the O'Connell plant, the Jewells point to the following circumstances: ~~the fact~~ the Bank granted them the equipment loan for the plant, which under ordinary bank practices would presuppose the extension of long-term financing; Jensen's favorable comments during his April 1979 site visit and his reported urging of long-term financing; Sullivan's stated intention (to his superiors) to make a "RE loan for packing shed, dehydrator, etc.," coupled with the later appraisal request informing regional officials that the proposed O'Connell loan proceeds would ~~be used to~~ repay the Jewells~~, who in turn would~~ enabling them to discharge their debts ~~owed~~ to the Bank and PCA; and, lastly, statements ~~contained~~ in the Jewell's ~~supporting~~ credit reports that the unsecured short-term loans would be repaid by "financing of real estate" or "RE loan for packing shed dehydrator etc."[12]

However, the Bank points out, correctly we believe, that the circumstances and events highlighted provide no basis to establish that a binding agreement was formed. ~~nothing of probative value as to the essential elements of a binding agreement, namely, the~~

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[12] Over the Bank's objection, the trial court permitted expert testimony that Sullivan's actions and the Bank's conduct gave rise, inter alia, to an implied commitment of long-term financing. The Bank renews the objection on appeal, strongly contending that the irrelevant opinions of law prejudicially tainted the validity fo the jury verdicts. In view of our determination (*post*), we need not discuss the questionable ruling.

~~amount of the loan, the rate of interest, the terms of repayment, applicable loan fees and charges.~~

It is, of course, elemental that creation of a valid contract requires mutual assent ~~to definite terms,~~ ordinarily evidenced by an offer and acceptance. (See generally Civ. Code, §§ 1550, 1565; 1 Witkin, Summary of Cal. Law (9th ed. 1987) Contracts, § 128, p. 153.) Preliminary negotiations or an agreement for future negotiations are not the functional equivalent of a valid, subsisting agreement. "A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent." (Rest.2d Contracts, § 26, p. 75.)

As the distinguished commentator explains: "When the evidence clearly shows . . . that the only (and the complete) subject matter that is under consideration is left for further negotiation and agreement, there is no contract, not for vagueness or indefiniteness of terms but for lack of any terms." (Corbin on Contracts, § 95, p. 397.)

Here, the entire subject matter under consideration—the long-term loan—was at best left open to future negotiations and agreement. George M. Jewell, fully aware of Sullivan's limited lending authority, was informed that Sullivan was "working on" obtaining the necessary approval from his superiors.[13] The Jewells' hopeful expectation that a loan agreement would eventually be reached was simply that: an expectation. ~~None of the essential terms were ever decided upon.~~ The Bank's manifestation of assent never materialized; and no agreement was ever formed.

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[13] The fallacy of the reasoning advanced by the Jewells is inherent in their unjustified assumption that Sullivan's repeated assurances that things would be "worked out" constituted a binding loan commitment. However, as previously discussed, assurances to work things out amount to no more than promises to continue negotiations looking to a future agreement.

Under such circumstances, the Bank was under no legal obligation or commitment to make a long-term loan.[14]

Nor can the credit report (CR-115) submitted by the local branch ~~Bunch~~ in October 1979 be transformed into a contract, as contended.[15] That report was submitted without the Jewells' knowledge well after Sullivan notified the Jewells that no loan was forthcoming. Clearly, the unilateral submission under such circumstances could not constitute a mutual agreement between the parties on the terms and conditions proposed in that document.

The related theory that an agreement existed to extend financing on the Jewell ranch finds even less support in the record. ~~Once again.~~ There is a complete lacuna in the proof of essential terms of the claimed loan agreement: namely, the amount of the loan, the rate of interest, the terms of repayment, applicable loan fees and charges. The suggest~~ed~~ion ~~inference~~—that terms similar to those contained in the 1979 credit report would apply on the ranch loan—is both illogical and unreasonable. First, the proposed O'Connell plant loan was to provide long-term refinancing of the short-term construction loans; in contrast, the ranch loan discussions focused on the future "needs," if any, of the Jewells. As noted, by 1980, the Jewells were seriously overextended with the Bank, their growers and PCA. Yet no specific financial needs, loan amount or relevant terms were ever discussed. Moreover, George M. Jewell had indicated unequivocally on at least two earlier occasions that the ranch would not be used as security for a

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[14] ~~The Jewells' alternate theory of promissory estoppel (grounded on the assurance implied in making the short-term loans) is unpersuasive. Not only did they fail to assert such theory below, an omission generally fatal to review on appeal, but in any case, it affords no comfort since estoppel obviates only the need for consideration, not the necessary promise. (*Raedeke v. Gibraltar Sav. & Loan Assn.* (1974) 10 Cal.3d 665, 672. *Laks v. Coast Fed. Sav. & Loan Assn.* (1976) 60 Cal.App.3d 885, 890-891.)~~

[15] In October 1979, a local ranch official submitted a CR-115 to the regional credit office seeking approval of a $1.9 million O'Connell loan. The Jewells were unaware of this action. The loan was never approved, and the CR-115 was eventually returned to the local branch.

bank loan. Quite clearly, there is no competent evidence of the essential ingredients of a binding agreement to make a long-term loan secured by the ranch itself.

Inevitably, we must conclude the Jewells' reliance on a tort theory of bad faith *denial* of a contract to support the judgment is wholly misplaced. Such a theory of relief is unavailable where, as here, no underlying agreement exists. Without proof of an underlying agreement, tort liability may not be imposed on the Bank for its failure to provide long-term financing to the O'Connells or to the Jewells.

C.

Failure to Distribute Assets

Relying on similar theories of fraud and bad faith denial of a contract, the Jewells contend that the Bank's failure to apply the satellite parcels' sales proceeds to the debt owed their growers or PCA, as promised by Bunch, rendered the Bank liable in damages. Had ~~they~~ the Jewells known the Bank would ultimately refuse to honor its commitment to repay ~~the Jewells~~ their creditors, it is argued, ~~they~~ the Jewells would never have agreed to assign trust deeds on their properties in the Bank's favor.

It is axiomatic that to obtain a recovery for fraud, a claimant must prove, inter alia, that damages were sustained as a proximate cause of the fraudulent conduct. (Prosser & Keeton, Law of Torts, *supra*, § 110, p. 767.) Assuming, arguendo, a claimant's ~~justifiable~~ reliance on the actionable misrepresentation, no liability attaches if the damages sustained were otherwise inevitable or due to unrelated causes. (~~Ibid.,~~ Harper, James & Gray, The Law of Torts (2d ed. 1986) § 7.13, p. 465 ; see also Bezaire v. Fidelity & Deposit Co. (1970) 12 Cal.App.3d 888, 892-893.) The absence of the necessary element of causation, we conclude, is fatal to ~~their~~ the Jewells' claim.

Even if Bunch's promise were false and fraudulent, the property loss sustained by the Jewells was not the product of Bunch's false promise but was the direct result of their self-created indebtedness. Put differently, even had they not assigned the trust deeds,

their property would still have been subject to the satisfaction of the existing claims of their creditors, ~~they still would have lost their property to the creditors.~~

Moreover, had the Bank distributed the proceeds to PCA and the growers, undoubtedly such distribution would have been successfully challenged by the bankruptcy trustee as an illegal preferential distribution. (See 11 U.S.C. § 547(b).) As it happened, the trust deeds and sales proceeds were eventually turned over to the bankruptcy trustee as part of the estate to be administered for the benefit of creditors. Thus, PCA and the growers stand in no less favorable position than if the Bank had made a voidable preferential distribution to them.

Understandably, the Jewells complain of the damages occasioned by the Bank's nearly three-year delay in turning over the assets to the trustee-in-bankruptcy.[15]

But the appropriate forum to seek recovery of damages in the form of attorney fees (as costs against the Bank) was the bankruptcy proceeding itself. Once a bankruptcy action is commenced, the bankruptcy court has exclusive jurisdiction over the debtor's property. (28 U.S.C. § 1334(ed), formerly § 1471(e).) Thus, it is within the exclusive jurisdiction of the bankruptcy court to recover or restore assets belonging to the estate. (1 Cowans, Bankruptcy Law and Practice (1987) § 1.2(k), pp. 33- 34; 9 Am. Jur.2d, Bankruptcy, §§ 487-489, pp. 793-797.) As part of such action, the trustee may also recover prejudgment interest, costs, attorney fees and damages for loss of use of the property. (Bankruptcy Rule 7054.) Because the damages here asserted—attorney fees incurred due to the Bank's intransigence—were recoverable in the bankruptcy proceeding, the Jewells cannot now split their cause of action in an attempt to recover them in this lawsuit. (See *Hatch v. Bank of America* (1960) 182 Cal.App.2d 206, 210 [plaintiff cannot maintain a second action for damages (loss of use) following quiet title and possession action].)

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[15] Apparently, the "turn-over" order required years of litigation and substantial costs in attorney fees.

Our analysis herein of the Jewells' fraud claim applies with equal force to the tandem claim of bad faith denial of a contract. Though the Jewells characterize their action in terms of a tort action, the gravamen of the claim asserted is a *breach* of contract. But even so considered, no merit is discerned: the Bank ultimately, though belatedly, performed in turning over the assets to the Jewells' legal representative, the trustee-in-bankruptcy. However, as already determined, the attorney fees and costs incurred in effecting the involuntary transfer are not recoverable in this subsequent action.

* * *

In conclusion, we hold that on the record before us the Jewells have failed to prove the Bank's liability in damages on the basis of fraud or bad faith denial of a contract. Accordingly, the jury's verdicts for compensatory damages cannot stand. And since the claims for punitive damages are mere incidents to the causes of action and cannot constitute the basis thereof (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801-802; *Hilliard v. A. H. Robins Co.* (1983) 148 Cal.App.3d 374, 391), the respective awards for such damages must be similarly vacated and set aside.

II.

KRUSE COMPLAINT

Mrs. Kruse's claim against the Bank was based solely on the Bank's conduct which contributed to her decision to transfer her controlling stock interest in the O'Connell Company to the Jewell family in 1979. The theory advanced at trial was that the Bank fraudulently induced Mrs. Kruse to execute the transfer of stock by misrepresenting to Mrs. Kruse that long-term financing would then be provided. Mrs. Kruse was allegedly injured by the stock transfer because by relinquishing control of her company to the Jewells, she was thereby prevented from obtaining a long-term loan elsewhere.[16]

[16] Mrs. Kruse argued below that the Bank's improper conduct was motivated by a desire to destroy the O'Connell Company, a competitor of the Co-op for the supply of available apples. It is noteworthy that on

The jury awarded Mrs. Kruse $2.77 million in compensatory damages: $2.67 million on alternate theories of fraud and intentional interference with prospective business advantage and $100,000 for emotional distress. The jury also awarded $6.675 million in punitive damages. We find the verdict likewise unsupported by the evidence in the record.

A.

Fraud

In order to uphold the verdict on the grounds of fraud, it must be shown by the evidence that the plaintiff changed her position in justified reliance on the fraudulent misrepresentation resulting in damage. (Civ. Code, § 1709; 4 Witkin, Summary of Cal. Law (8th ed 1974) Tort. § 479, p. 2738; see also 37 Am.Jur.2d, Fraud and Deceit, § 223, pp. 297-299,) The change of position herein was the stock transfer upon the mistaken expectation that a long-term loan would be given. Mrs. Kruse was entitled, of course, to rescind the stock transfer when the long-term financing did not materialize. (Civ. Code, § 1689.) And a claim for rescission against the Jewells was initially pursued. However, by the time of trial, she had abandoned her claims against the Jewells for the now worthless stock.

Mrs. Kruse claimed two species of damages against the Bank as a result of the stock transfer: 1) the difference between the fair market value of her stock ($490,393) and the amount she received for it ($180); and 2) anticipated profits of the O'Connell Company, payable as dividends, which were lost because the O'Connell Company failed to receive the expected long-term loan. On appeal she reiterates her claim of damage by virtue of the "loss of the fair market value of the stock at the time it was pledged to the Jewells and the returns which it would have generated had the long-term financing been provided."

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the Bank's motion for new trial, however, the trial court found "the evidence is not sufficient to show that the wrongful conduct of the defendant was motivated by a corporate plan or scheme to put the parties out of business."

As to the diminished value theory of damages, the Bank correctly points out that it played no part in setting the price paid for the stock and any resulting loss of value. The nominal $180 payment by George R. Jewell was determined in the course of negotiations on January 7, 1979, between George M. Jewell, Mrs. Kruse and her son, Dan O'Connell. It is reasonable to conclude that Mrs. Kruse acquiesced in the nominal sum fixed with the expectation of facilitating repurchase at some future time. The price paid for the stock was totally independent of the asserted misrepresentations by the Bank. We are furnished no evidence from the record supporting a finding of a causal connection between the alleged damages and the Bank's fraudulent conduct.

It seems obvious that Mrs. Kruse's central complaint is not the Bank's fraudulent inducement but rather the Bank's refusal to provide long-term financing for the O'Connell Company. Indeed, her brief explains her position that she was damaged "not as the Bank asserts because of the nominal price of $180, but because the Bank repudiated its commitment to fund a long-term loan. . . . [¶] . . . Had the Bank lived up to its promise [of long-term financing], Mrs. Kruse would not have been damaged."

Yet, contrary to her assertions, the record contains no evidence of a "commitment" or "promise" to make such long-term loan. ~~A~~Unlike the Jewells, at trial Mrs. Kruse conceded there was *no contract* to lend money, since *no terms had been negotiated.* The thrust of her argument is directed to the Bank's conduct in 1977 and 1978 as the basis of an implied representation that the Bank would fund a long-term loan when in fact it had no intention to do so. ~~That~~ The argument falls under its own weight, the record reflecting an absence of any substantial evidence supporting either an ~~enforceable~~ implied promise ~~or commitment~~ to lend money or the essential requirement of justifiable reliance.

At most, Sullivan expressed interest in securing the desired financing. As previously discussed, he and George M. Jewell engaged in ongoing discussions and negotiations for the purpose of obtaining the necessary loan approval from Sullivan's superiors, a prospect long incubating within George M. Jewell's hopeful expectation, an optimism he quickly shared ~~by~~ with Mrs. Kruse

and her son. Yet, George M. Jewell's optimism was unfounded. He knew that Sullivan lacked authority to approve the sizable loan necessary to fund the dehydration plant. The very premise of their frequent discussions was the need to obtain the approval of the regional office. In fact, the stock transfer in response to Sullivan's request was purportedly a step towards facilitating the needed approval. It ~~seems~~ is indisputable that the regional office's approval was recognized by both the Jewells and the O'Connells as a condition precedent to the Bank's expected commitment to extend long-term financing. The evidence of such contingent expectations and negotiations is far removed from a binding promise to lend money and also negates any reasonable reliance upon the Bank's alleged misrepresentations.

Moreover, the argument advanced is fatally defective for other reasons. We note~~, too,~~ that Mrs. Kruse's position is in polar opposition to that advanced by the Jewells. Mrs. Kruse claims that the Bank was bent on bankrupting the O'Connell enterprise in order to save the Co-op, the Bank's largest customer; that in furtherance of that design, the Bank secretly never intended to provide the needed financing to the O'Connell Company; and that the assurances given to George M. Jewell were knowingly false and calculated to deceive him. The Jewells, on the other hand, claim the Bank wanted the O'Connell Company to survive economically and used the Jewells as a vehicle to accomplish that goal. (Part I.A., *ante*.) The Jewells argue that the Bank was fully committed to providing the financing but then later repudiated its commitment. (Part I.B., *ante*.)

Thus, the jury's findings in favor of both Mrs. Kruse and the Jewells appear to be internally inconsistent and mutually exclusive: if the jury found that the Bank entered into an enforceable contract with the Jewells to provide financing for the O'Connell Company, then logically it could not also find that the Bank officials gave false assurances to Mrs. Kruse. Conversely, if the jury found the Bank falsely promised Mrs. Kruse to fund the long-term loan, it could not have simultaneously found that the Bank had actually agreed to make the loan. Such a material inconsistency in the jury's verdicts alone mandates reversal of the judgment.

But, in any event even if we were to view the Bank's statements and conduct as rising to the level of an enforceable promise to lend money, no competent evidence is shown of any causal connection between the change of position by Mrs. Kruse and her claimed damages. Her assertion that the Bank's "prolonged deceit" inducing her stock transfer "led to the financial ruin of them all" is ~~sheer~~ nonsense. The stock transfer in no way imaginable caused the collapse of the O'Connell Company or, for that matter, the Jewells' own dire circumstances.

The damage which resulted from the lack of financing was the termination of the O'Connell Company's apple processing business, and that damage was to the *corporation*, not to Mrs. Kruse individually. The trial court properly precluded Mrs. Kruse from recovering damages for any injury to the corporation, as she lacks standing to recover for injuries to the company itself.[17] (*Sutter v. General Petroleum Corp.* (1946) 28 Cal.2d 525, 530; see also *Jones v. H. F. Ahmanson & Co.* (1969) 1 Cal.3d 93, 106-107; *Smith v. Tele-Communication, Inc.* (1982) 134 Cal.App.3d 338, 342- 343.)

We conclude that there is no evidence of a substantial nature that either the transfer of stock or the attendant change of position by Mrs. Kruse was a proximate cause of her financial loss.

B.

Interference with Economic Advantage

Mrs. Kruse's claim of intentional interference with prospective economic advantage, while not well formulated, rests on a theory ~~(as argued to the jury)~~ that ~~Bunch's action in~~ the Bank's refusal to provide long-term financing and its efforts to liquidate~~ing~~ the O'Connell Company destructively interfered with the relationship between Mrs. Kruse and the corporation. But the theory asserted amounts to nothing more than an indirect attempt to assert

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[17] Parenthetically, we have taken judicial notice that the trustee-in-bankruptcy has filed a lawsuit in federal court against the Bank seeking damages in behalf of the corporate entity, the O'Connell Company.

damages to the corporation which Mrs. Kruse lacked standing to do. (*Sutter v. General Petroleum Corp., supra,* 28 Cal.2d at p. 530.)

In her brief, she declares that the interference occurred "when the Bank induced plaintiff to pledge her stock to the Jewell family by promising that it would finance the O'Connell project . . . [which it] refused to do . . . leaving [her] powerless to regain control of her company."

To the extent that the argued interference was directed to the unkept promise of long-term financing, Mrs. Kruse failed to ~~state~~ establish a cause of action. The tort of intentional interference with economic advantage affords a remedy for wrongful interference with an economic relationship by a *third party*. (*Dryden v. Tri-Valley Growers* (1977, 65 Cal.App.3d 990, 998-999; *Kelly v. General Telephone Co.* (1982) 136 Cal.App.3d 278, 288; see also Prosser & Keeton. The Law of Torts, *supra*, § 129, p. 978; Rest.2d Torts, § 766.) Here, however, only two parties were involved: the O'Connell Company, anxiously hoping for the bank loan, and the Bank itself which, through a convoluted reasoning process, is charged with interference by denying the loan.

~~Nor does t~~The presence of the Jewells does not fulfill the third party requirement. In the context presented, the Bank's alleged promise was to provide long-term financing directly to the O'Connell Company, *not* to the Jewells. And, at the risk of repetition, it bears emphasis that George M. Jewell consistently rejected any suggestion to obtain financing by encumbering the ranch.

While wrongful interference with one's *own* business may arguably constitute a breach of contract, it cannot serve as the basis of the claimed tort liability. Indeed, interference with business relations is ordinarily privileged if one has a financial interest in one of the parties. (*Culcal Stylco, Inc. v. Vornado* (1972) 26 Cal.App.3d 879, 882; Rest.2d Torts, § 769.) The Bank's refusal to extend long-term financing to the O'Connell Company, even if that refusal amounted to an outright repudia-

tion of a firm commitment, does not give rise to tort liability for interference with an economic advantage.[18]

Mrs. Kruse alternatively claims the Bank wrongfully interfered with the relationship between the O'Connell Company and George R. Jewell, its majority shareholder. She theorizes that by denying the long-term loan, the Bank prevented the corporation from paying its indebtedness to the Jewells forcing the latter to liquidate the corporation. The trial court, as noted, correctly determined that Mrs. Kruse could not seek recovery of damages for any injury to the corporation by reason of her lack of standing to do so. (*Sutter v. General Petroleum Corp., supra*, 28 Cal.2d 525,) The claim lacks merit.

C.

Emotional Distress

The jury awarded Mrs. Kruse $100,000 in damages for intentional infliction of emotional distress. Yet, the precise legal basis supporting the claim eludes comprehension. Mrs. Kruse argues ~~in her brief~~ that the Bank's liability arises from its deliberate conduct ~~in "defrauding a widowed lady of all of her property, including her homes and her livelihood, and~~ with the knowledge she lived on property owned by the O'Connell Company whose bankruptcy would subject~~ing~~ her to the threat of being evicted and homeless." But the ~~legal contours of~~ nature of the bank's misconduct upon which the admittedly sympathetic plaint ~~nowhere appear~~ is grounded remains unclear.

Insofar as the claim for emotional distress is based on the same conduct alleged to show fraud, no recovery is permitted. Emotional distress is not recoverable as an element of damages for

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[18] ~~Mrs. Kruse seems to suggest a three-party arrangement by virtue of the fact that the Bank tried to redirect the Jewells' apples to the Co-op. In this respect, Mrs. Kruse seems to argue that the Bank interfered with the prospective apple supply contracts between the Jewells and the O'Connell Company. If so, there is no causal connection between the tortious activity and the damages since the attempted diversion of apples did not cause the financial collapse of the O'Connell Company.~~

fraud. (*Channell v. Anthony* (1976) 58 Cal.App.3d 290, 315; *O'Neil v. Spillane* (1975) 45 Cal.App.3d 147, 159.)

~~Most likely, the claim is directed to the conduct of Bunch in seeking to liquidate the O'Connell properties.[19]~~

~~The Bank persuasively argues, however, that its conduct was privileged.~~

Insofar as the claim is directed to the Bank's efforts to liquidate the O'Connell properties, the conduct was privileged. A party is not subject to liability for infliction of emotional distress when it has merely pursued its own economic interests and properly asserted its legal rights. (See *Fletcher v. Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 395; see also Rest.2d Torts, § 46, com. g, p. 76.)

Here, the Bank's interest in liquidating the O'Connell properties was an act of economic self-interest. The trust deeds on the O'Connell properties had been assigned to the Bank by the Jewells. Without liquidating the O'Connell properties, the Jewells would have been unable to repay the debts owed by them to the Bank.

Of course, the Bank's actions in its own interest are circumscribed in scope and may not be undertaken in an impermissible manner. (See *Fletcher v. Western National Life Ins. Co., supra*, 10 Cal.App.3d 376.) But there is no cognizable showing that the Bank acted in an ~~improper~~ illegal or impermissible fashion. There were no threats or words of abuse directed toward the plaintiff. (Cf. Sanchez-Corea v. Bank of America (1985) 38 Cal.3d 892, 908-909 [public ridicule and use of profanities]; *Alcorn v. Anbro Engineering, Inc.* (1970) 2 Cal.3d 493 [racial insult and wrongful discharge]; *Golden v. Dungan* (1971) 20 Cal.App.3d 295 [midnight visits by process server]; *Bundren v. Superior Court* (1983) 145 Cal.App.3d 784 [demands for payment while plaintiff lay in

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[19] ~~Specifically, Bunch demanded in November 1980 that George M. Jewell, as majority shareholder, liquidate the O'Connell properties in order to repay the Bank. When George M. Jewell refused, Bunch met with Dan O'Connell to discuss arrangements for the sale of the O'Connell homes and properties.~~

hospital bed].) In fact, Mrs. Kruse had no ~~relationship~~ contact with the Bank and its officials, directly or otherwise. The Bank's "conduct" consisted of statements by Bunch made to *others*: ~~1)~~ to George M. Jewell urging liquidation proceedings~~; 2)~~ and to Dan O'Connell and his sister pointing out the need to sell the O'Connell properties.[19] ~~Because Dan O'Connell's sister was a licensed real estate broker, the question arose whether she should act as broker in the liquidation sale prompting Bunch to blatantly question her "guts" to sell her mother's house.~~ While Bunch's heartless and insensitive remarks ~~may~~ merit opprobrium, they do not qualify as the kind of "outrageous" conduct necessary to support an action for intentional infliction of emotional distress.[20] (See, e.g., *Davidson v. City of Westminister* (1982) 32 Cal.3d 197; *Cortez v. Macias* (1980) 110 Cal.App.3d 640.)

In summary, we conclude that Mr. Kruse has failed to establish by substantial evidence that the Bank was in any ~~way~~ manner legally ~~answerable~~ responsible for her tragic plight. Accordingly, the judgment in her favor based upon a verdict of fraud, interference with economic advantage or infliction of emotional distress must be reversed.

In view of our dispositive determinations in the matters before us, we need not discuss the remaining issues raised on appeal.

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[19] When a question arose whether Dan O'Connell's sister, a licensed real estate broker, should act as broker in the liquidation sale, Bunch bluntly questioned her "guts" to sell her mother's house.

[20] Testimony that Bank officials knew as early as 1974 that an execution sale of her home would be "upsetting" possessed little relevance as to whether the now challenged conduct was outrageous in legal contemplation. Perhaps all that can be said is that the axis of the financial world turns more on economic reality than human compassion.

The judgments, and each of them, are reversed. The cross-appeals are dismissed as moot. Costs are awarded to the Bank.

CERTIFIED FOR PUBLICATION:

_____

Racanelli, P.J.

We concur:

_____

Elkington, J.

_____

Newsom, J.

APPENDIX B

In the Court of Appeal of the State of California
First Appellate District
Division One

AO 33064, AO 39161
(Sonoma County Super.
Ct. No. 112439)

Irene O'Connell Kruse,
Plaintiff and Appellant,

v.

Bank of America,
Defendant, Cross-Defendant and Appellant;

Charles Duck, as Trustee, etc., et al.,
Cross-Complaintants and Appellants.

[Filed June 17, 1988]

The requests for disqualification of the named justices and of the panel, as contained in plaintiff and appellant Irene O'Connell Kruse's Request That the Justices of Division One Grant Rehearing and Disqualify and Recuse Themselves, and in cross-complainants and appellants Charles Duck's and George R. Jewell's Petition for Disqualification Or In the Alternative Petition for Rehearing, have been duly considered as separate and independent motions to disqualify the individual justices therein designated. Said requests, filed during the pendency of the moving parties' petitions for rehearing, present no basis for disqualification, and each and all are denied. (See *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 939-940.)

Dated: June 17, 1988

RACANELLI, P. J.

NEWSOM, J.

ELKINGTON, J.

APPENDIX C

Order Denying Review

After Judgment by the Court of Appeal
S006208
First District, Division One, No. AO33064, AO39161

In The Supreme Court of the State of California

In Bank

[Filed Sept. 1, 1988]

Kruse, Appellant,

v.

Bank of America, Appellant;
Duck Etc., et al., Appellants

Lucas, C.J. and Panelli, J., Did Not Participate.

The requests to take further evidence are DENIED because petitioners have not made a prima facie showing of conflict of interest or bias, much less a deprivation of due process of law.

The petitions for review are DENIED.

MOSK
Acting Chief Justice

APPENDIX D

Civil No. A033064

Court of Appeal of the State of California
First Appellate District
Division One

Irene O'Connell Kruse,
Plaintiff, Respondent, and Cross-Appellant,
George R. Jewell and Charles Duck,
Trustee of the Bankruptcy Court of
George M. Jewell and Laura E. Jewell,
Cross-Complainants, Respondents,
Cross-Appellants, and Appellants,

v.

Bank of America National Trust and
Savings Association,
Defendant, Appellant, Cross-Respondent,
and Respondent.

Appeal from the Judgments of the Superior Court
of the State of California, County of Sonoma

Honorable Laurence K. Sawyer, Judge

Application of Cross-Appellant Irene O'Connell Kruse
For Relief from Trial Court Confidentiality Order,
Or, in the Alternative, for Leave to File Brief
Under Seal; Memorandum of Points
And Authorities; Order

Lukens, Cooper, Perry
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Attorneys for Plaintiff, Respondent
and Cross-Appellant Irene O'Connell Kruse

I, CAROL G. PERRY, hereby declare:

1. I am a member of the firm of Lukens, Cooper, Perry & Drummond, attorneys for respondent and cross-appellant Irene O'Connell Kruse ("Mrs. Kruse").

2. During the trial of this case, Mrs. Kruse sought to introduce evidence of two separate incidents relevant to the credibility of one of the Bank of America's ("the Bank") major witnesses in the case and to the oppressive nature of the fraud which is the subject of the case. The trial court excluded the evidence of both incidents.

3. Subsequent to the conclusion of the trial, the Bank moved the trial court to issue an order deleting certain portions of the reporter's transcript of the proceedings regarding the admissibility of this evidence.

4. On June 13, 1986, the trial court entered an "Order Regarding Confidentiality Of Transcript" ("the Order") in which it denied the Bank's motion and, instead, ordered that certain portions of the reporter's transcript be sealed. The Order further provided that:

> This order does not restrict the content of briefs to be filed by the parties at the appellate level, but no portion of the reporter's transcript described [in the order] shall be attached to briefs or made public without prior approval of the appellate court.

A copy of the Order is attached hereto as Exhibit A.

5. In her cross-appeal, Mrs. Kruse contends that the trial court's exclusion of the evidence in question was erroneous. In order to comply with the Order forbidding the relevant portions of the reporter's transcript from being made public, she addressed this issue in a separate supplement to her opening brief as cross-appellant and she sought to file the supplement under seal with this Court.

6. By this application, Mrs. Kruse seeks an order lifting the confidentiality condition imposed by the trial court or, in the alternative, granting her leave to file the supplemental brief under

seal. Since her supplemental brief was lodged with the Court on April 7, 1987 and served on all parties on that date, any order issued by the Court should be entered *nunc pro tunc* to that date.

7. As set forth in the memorandum of points and authorities below, there is a strong public policy in favor of free public access to court records. Even if this Court, however, determines that this policy should be superceded in this case and that the record should remain sealed, Mrs. Kruse is still entitled to appellate review of the underlying decision of the trial court to exclude the evidence which is the subject of the Order. She respectfully requests therefore that she be permitted to file her brief on this issue under seal.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 30th day of April, 1987 at San Francisco, California.

CAROL G. PERRY

MEMORANDUM OF POINTS AND AUTHORITIES

Except in certain narrowly defined circumstances which are not relevant to this case, the sittings of every court are to be public. Code of Civil Procedure section 124. Publicity of court proceedings is a highly regarded common law practice, the chief purposes of which are: 1) to deter witnesses from testifying falsely; 2) to obtain disclosure of other evidence from spectators; 3) to improve the conduct of judge, jury and counsel by subjecting them to public observation; 4) to allow third persons to determine the effect of litigation upon their own interests; and 5) to educate people generally on the operation of the judicial system. *Cembrook v. Sterling Drug, Inc.* (1964) 231 C.A.2d 52, 59.

Just as court proceedings are to be public, so are the records of those proceedings public. To prevent secrecy in public affairs, public policy makes public records and documents available for public inspection by newsmen and members of the general public alike. *Estate of Hearst* (1977) 67 C.A.3d 777, 782. A court does

have a very limited right to prevent public access to its records. Such a restraint, however, is justified only in certain very narrowly defined situations. The circumstances under which a countervailing policy may come into play generally involve considerations of individual security, personal liberty, private property, or injury to the public or the public good. Even where such considerations exist, restrictions on public access should be temporary. *Craemer v. Superior Court* (1968) 265 C.A.2d 216, 222.

In this case, there are no circumstances which outweigh the policy in favor of free access to the record of the proceedings in the trial court. There is no reason why the review by this Court of the trial court's actions should take place in secret. The confidentiality order should therefore be lifted.

Should this Court decide that the Order should remain in effect for some additional period of time, Mrs. Kruse respectfully requests that an order be issued specifically permitting her to file her supplemental brief under seal. As cross-appellant, she has the right to present to this Court a full and complete argument with appropriate citations to the record as to why the trial court's exclusion of the evidence in question constituted prejudicial error. The only way that she can do so within the restrictions of the Order is to file her brief under seal.

The supplemental brief was lodged with the Court and served on all parties on April 7, 1987. Mrs. Kruse therefore requests that the order of this Court be issued *nunc pro tunc* so that the brief, whether or not filed under seal, will be deemed to have been filed on that date.

Dated: April 30, 1987

CAROL G. PERRY

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Attorneys for Plaintiff
Irene O'Connell Kruse

In the Superior Court of the State of California
In and for the County of Sonoma

No. 112439

Irene O'Connell Kruse,
Plaintiff,

vs.

George M. Jewell, et al.,
Defendants.

And Related Cross-Actions

Order Regarding Confidentiality of Transcript

[Filed June 13, 1986]

The request of defendant and cross-defendant Bank of America N T & S A for deletion of certain portions of the reporter's transcript on appeal came on regularly for hearing on June 5, 1986, before the above-entitled Court in Department 8, the Honorable Laurence K. Sawyer, Judge, presiding; Jeffrey H. Lowenthal of Leland, Parachini, Steinberg, Flinn, Matzger & Melnick appeared on behalf of Bank of America, William M. Lukens of Lukens, St. Peter & Cooper appeared on behalf of plaintiff Irene O'Connell Kruse, and Frances E. Komoroske

appeared on behalf of Charles Duck and George R. Jewell; and the parties having stipulated to an order for corrections of the reporter's transcript, which is filed as a separate document,

IT IS HEREBY FURTHER ORDERED as follows:

1. That the following portions of the reporter's transcript which pertain to the proceedings in chambers regarding the request of counsel for Bank of America to withdraw pursuant to Rule 2-111 of the Rules of Professional Conduct, and the pleadings pertaining thereto, as well as the transcript of the hearing to correct the reporter's transcript held on June 5, 1986, are ordered to be placed in a sealed envelope and delivered to the Court of Appeal:

Date	Volume	Pages
May 16, 1985	X	2229 to 2240
May 21, 1985	XII	2404 to 2419, 2551A to 2595
May 22, 1985	XIII	2677A to 2678
May 22, 1985	XIV	2758 to 2770 (first sequence)

2. The request of defendant Bank of America to delete the above portions of the reporter's transcript is denied.

3. The confidentiality order issued during the trial shall be continued until further order of this Court.

4. This order does not restrict the content of briefs to be filed by the parties at the appellate level, but no portion of the reporter's transcript described above shall be attached to briefs or made public without prior approval of the appellate court.

5. This order is without prejudice to any party's right to seek further orders from the Court of Appeal.

Dated: June 13, 1986

Laurence K. Sawyer
Judge of the Superior Court

ORDER

IT IS HEREBY ORDERED that the provisions of the Order Regarding Confidentiality Of Transcript entered by the Sonoma County Superior Court on or about June 13, 1986 which provisions placed certain portions of the reporter's transcript under seal and restricted the parties from referring to said sections in their briefs and from making them public are hereby dissolved.

IT IS FURTHER ORDERED that the sealed supplement to the opening brief of cross-appellant Irene O'Connel Kruse lodged with this Court on April 7, 1987 shall be filed by the Clerk of this Court and that the filing date shall be deemed to be April 7, 1987.

Dated:

Presiding Judge

PROOF OF SERVICE BY MAIL

I declare that I am employed in the County of San Francisco, California. I am over the age of eighteen years and am not a party to the within cause; my business address is Lukens, Cooper, Perry & Drummond, One Maritime Plaza, Suite 1200, San Francisco, California.

On April 30, 1987, I deposited in the mail at San Francisco, California, a copy of the attached application of Cross-Appellant Irene O'Connell Kruse For Relief From Trial Court Confidentiality Order, Or in the Alternative, or Leave to File Brief Under Seal; Memorandum of Points and Authorities; Order in a sealed envelope, with postage fully prepaid, addressed as follows:

David B. Flinn, Esq.
Steven B. Mains, Esq.
Jeffrey Lowenthal, Esq.
Leland, Parachini, Steinberg, Flinn,
Matzger & Melnick
333 Market Street, 27th Floor
San Francisco, CA 94105

Warren Christopher, Esq.
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400 South Hope Street
Los Angeles, CA 90071-2899

A. Barry Cappello, Esq.
Thomas G. Foley, Jr., Esq.
Frances E. Komoroske, Esq.
Cappello & Foley
831 State Street
Santa Barbara, CA 93101

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on April 30, 1987 at San Francisco, California.

Raynetta M. Pettaway

Court of Appeal of the State of California
in and for the
First Appellate District
Division One
No. A033064
Sonoma Co. Superior Court 112439

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,
George R. Jewell, et al.,
Cross-Complainants, Respondents,
Cross-Appellants and Appellants,

v.

Bank of America National Trust and
Savings Association,
Defendant, Appellant, Cross-Respondent
and Respondent.

[Filed July 3, 1987]

BY THE COURT:

The application of cross-appellant Irene O'Connell Kruse for relief from trial court confidentiality order, or in the alternative, for leave to file brief under seal, is denied.

Dated July 3, 1987

Elkington, J., Acting P.J.

APPENDIX E

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED MAY 10, 1982

NAME: William A. Newsom

MAILING ADDRESS: P.O. 160 Dutch Flat

OFFICE HELD OR SOUGHT:

Associate Justice, Ct/Appeal

STATE OF CALIFORNIA

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1981, through December 31, 1981.

SCHEDULE 721-A

INVESTMENTS

SQUAW VALLEY IMPVT. CO.

Common Stock 36 shares

INVEST (Family Co.)

DATE ACQUIRED: 1981

VALUE EXCEEDS: $10,000 but does not exceed $100,000

APPENDIX F

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED FEBRUARY 28, 1983

NAME: William A. Newsom

OFFICE HELD OR SOUGHT (E.G. COUNTY SUPERVISOR, CITY COUNCIL MEMBER, ETC.)

Associate Justice, Ct. Appeals

MAILING ADDRESS: 350 McAllister St., S.F. CA 94102

TELEPHONE NUMBER: 415-557-1915

STATE OF CALIFORNIA

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1983 [sic] through December 31, 1983 [sic].

VERIFICATION

I declare under penalty of perjury that I have used all reasonable diligence in

preparing this Statement, that I have reviewed the attached schedules and to the best of my knowledge the information provided in this Statement is true and correct.

Executed on Feb. 28, 1983, at San Francisco.

Signature _____

SCHEDULE C-2

INVESTMENTS

NAME OF BUSINESS ENTITY:

Dutch Flat Antiquarian Books

NATURE OF INVESTMENT, E.G. COMMON STOCK, PARTNERSHIP INTEREST, ETC.:

Owner

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Rare Books, Acquired 1982

VALUE: $1,001 - $10,000

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED FEB. 24, 1984

NAME: William A. Newsom

OFFICE HELD OR SOUGHT (E.G. COUNTY SUPERVISOR, CITY COUNCIL MEMBER, ETC.)

Associate Justice, California Ct. of Appeals

MAILING ADDRESS: 2250 Vallejo St., S.F., CA 94123

TELEPHONE NUMBER: 415-931-6287

STATE OF CALIFORNIA

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1983, through December 31, 1983.

VERIFICATION

I declare under penalty of perjury that I have used all reasonable

diligence in preparing this Statement, that I have reviewed the attached schedules and to the best of my knowledge the information provided in this Statement is true and correct.

Executed on February 20, 1984, at Dutch Flat, California.

SIGNATURE: /s/ William A. Newsom

SCHEDULE A - INVESTMENTS

NAME OF BUSINESS ENTITY:

Gold Standard

NATURE OF INTERESTS, E.G. COMMON STOCK, PARTNERSHIP INTEREST:

Common Stock

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Gold Mines

ACQUIRED: 1983

VALUE: $1,001 - $10,000

OWNERSHIP INTEREST: Less than 10%

NAME OF BUSINESS ENTITY:

Brennan J. Newsom

NATURE OF INTERESTS, E.G. COMMON STOCK, PARTNERSHIP INTEREST:

Partnership in Ownership of Common Stock

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Stock Purchase

ACQUIRED: 1983

DISPOSED: 1983

VALUE: $1,001 - $10,000

OWNERSHIP INTEREST: Less than 10%

NAME OF BUSINESS ENTITY:

Nicasio Partnership

NATURE OF INTERESTS, E.G. COMMON STOCK, PARTNERSHIP INTEREST:

Holds note and trust deed on real property

GENERAL DESCRIPTION OF BUSINESS ACTIVITY: Passive Investment

ACQUIRED: 1979

VALUE: $1,001 - $10,000

$10,001 - $100,000

OWNERSHIP INTEREST: Less than 10%

OFFICE OF THE CLERK

Court of Appeal

State of California

FIRST APPELLATE DISTRICT

April 13, 1984

Alice Hughes
The Fair Political Practices
Commission
Technical Assistant and
Analysis Division
P.O. Box 807
Sacramento, California 95804

Re: William A. Newsom

Dear Ms. Hughes:

We are forwarding herewith for filing the amended schedules with

verification for the Honorable William A. Newsom which we discussed on the telephone earlier this week. You may recall, I made inquiry as to what procedure the judge should follow as he inadvertently failed to include two items on his form 721. If there are any questions, please call the undersigned on ATSS 597-1929.

Very truly yours,

/s/ Clifford C. Porter

Clifford C. Porter
Clerk of the Court

SCHEDULE C-2

INVESTMENTS

NONE DISCLOSED.

NAME: William A. Newsom

FILED APR. 11, 1984

VERIFICATION OF AMENDMENT

I declare under penalty of perjury that I have used all reasonable diligence in preparing this Statement, that I have reviewed the attached schedules and to the best of my knowledge the information provided in this Statement is true and correct.

Executed on April 11, 1984, at S.F. Calif.

SIGNATURE: /s/ W. A. Newsom

FORM 721

STATEMENT OF ECONOMIC INTERESTS

FILED MARCH 1, 1988

NAME: William A. Newsom

MAILING ADDRESS: Court of Appeal,
350 McAllister St., San Francisco,
CA 94102

OFFICE SOUGHT OR HELD:

State of California Office:

Court of Appeal, Judge

Judicial Branch

ANNUAL STATEMENT

PERIOD COVERED: Disclose all reportable interests held or received during the period from January 1, 1987 through December 31, 1987.

SCHEDULE E -- LOANS

NAME: Bank of America

ADDRESS: High Street, Auburn, CA

(Customline Credit)

OVER $10,000

REPAID: No.

SPECIFIC SECURITY FOR LOAN INCLUDING GUARANTOR: None

INTEREST RATE: 18%

APPENDIX G

STATE OF CALIFORNIA

STATEMENT BY DOMESTIC STOCK CORPORATION

THIS STATEMENT MUST BE FILED WITH

THE CALIFORNIA SECRETARY OF STATE

(SEC. 1502 CORPORATIONS CODE)

FILED JUNE 25, 1982

3994440 Due Date 07-31-82 23076S

*

SQUAW VALLEY IMPROVEMENT CORPORATION

WILLIAM A. NEWSOM JR

350 McALLISTER ST

SAN FRANCISCO, CA 94102

THE CORPORATION NAMED HEREIN, ORGANIZED UNDER THE LAWS OF THE STATE OF CALIFORNIA, MAKES THE FOLLOWING STATEMENT:

Street Address of Principal Executive Office:

c/o Leland, Parachini, Steinberg, Flinn, Matzger & Melnick
333 Market Street, Ste. 2700
San Francisco, CA 94105

Mailing Address (Optional):

c/o Leland, Parachini, Steinberg, Flinn, Matzger & Melnick
333 Market Street, Ste. 2700
San Francisco, CA 94105

NAMES OF THE FOLLOWING OFFICERS ARE:

Barbara Newsom
Chief Executive Officer
333 Market Street, Ste. 2700
San Francisco, CA 94105

Sharon C. Mohun
Secretary
333 Market Street, Ste. 2700
San Francisco, CA 94105

Sharon C. Mohun
Chief Financial Officer
333 Market Street, Ste. 2700
San Francisco, CA 94105

NAMES AND COMPLETE BUSINESS OR RESIDENCE ADDRESS OF INCUMBENT DIRECTORS INCLUDING THOSE DIRECTORS WHO ARE ALSO OFFICERS. (Attach a supplemental list of directors if needed).

Barbara Newsom
333 Market Street, Ste. 2700
San Francisco, CA 94105

Sharon C. Mohun
333 Market Street, Ste. 2700
San Francisco, CA 94105

Patrick Newsom
333 Market Street, Ste. 2700
San Francisco, CA 94105

THE NUMBER OF VACANCIES ON THE BOARD, IF ANY:

None

AGENT FOR SERVICE OF PROCESS:

David B. Flinn

333 Market Street, Suite 2700

San Francisco, CA 94105

TYPE OF BUSINESS

Explanation must be brief:

Real Estate Investment

I DECLARE THAT I HAVE EXAMINED THIS STATEMENT AND TO THE BEST OF MY

KNOWLEDGE AND BELIEF, IT IS TRUE, CORRECT AND COMPLETE.

6/18/82	Ass't Secretary	David B. Flinn
Date	Title	

/s/ David B. Flinn
Signature of Corporate Officer or Agent

APPENDIX H

DECLARATION OF LUCILLE SANCHEZ-COREA

LUCILLE SANCHEZ-COREA, under penalty of perjury, declares as follows:

1. I was one of the plaintiffs in the case of Sanchez-Corea, et al. v. Bank of America (1985) 38 Cal.3d 892, in which the plaintiffs were awarded damages in the amount of $2,000,000, $1,000,000 in compensatory damages and $1,000,000 in punitive damages, against defendant Bank of America for fraud, breach of contract and other tortious conduct arising out of our banking relationship. The trial decision was appealed and assigned to Division One of the First Appellate District in San Francisco. Ultimately, the case was decided by the Supreme Court.

2. Oral argument before Division One occurred on December 28, 1982,

before Justices Holmdahl, Racanelli and Newsom. Sometime after the oral argument, Justice Holmdahl disqualified himself because of a conflict of interest. Ultimately, Justice Daniel Weinstein was assigned to Justice Holmdahl's position and the matter was re-heard before Justices Weinstein, Racanelli and Newsom on June 29, 1983.

3. I attended both hearings on oral argument before Division One on December 28, 1982 and June 29, 1983. I have no recollection of Justice Racanelli volunteering or disclosing that he owned a Visa card or other disqualifying facts at either of these hearings.

4. The foregoing information is within my personal knowledge, and if called upon as a witness I could competently testify thereto.

Executed this 14th day of July, 1988, at San Francisco, California.

/s/ Lucille Sanchez-Corea

LUCILLE SANCHEZ-COREA

APPENDIX I

1ST DOCUMENT of Level 1
printed in FULL format

*** THIS DATA IS FOR INFORMATION PURPOSES ONLY. CERTIFICATION CAN ONLY BE OBTAINED THROUGH THE OFFICE OF THE CALIFORNIA SECRETARY OF STATE. ***

CALIFORNIA SECRETARY OF STATE,

CORPORATE RECORD

NAME: Squaw Valley Improvement Corporation

TYPE OF CORPORATION: Articles of Incorporation (Domestic)

CORPORATE STATUS: Dissolved

DATE OF INCORPORATION/QUALIFICATION: 07/13/1960

MAILING ADDRESS:

c/o Leland Parachini Steinberg
Flinn Matzger Melni [sic]
333 Market St #2700
San Francisco, CA 94105

REGISTERED AGENT: David B. Flinn

REGISTERED OFFICE:

333 Market St Ste 2700

San Francisco, CA 94105

PRESIDENT: Barbara Newsom

333 Market St Ste. 2700

San Francisco, CA 94105

STATEMENT OF OFFICERS FILE NUMBER:

220126

STATEMENT OF OFFICERS FILE DATE:

06/25/82

TAX BASIS: Stock

CORPORATION NUMBER: 399444

HISTORY:

DATE: 09/24/1980

TRANSACTION: Secretary of State

Delinquency Letter

DATE: 12/01/1980

TRANSACTION: Secretary of State

De-Certification

DATE: 05/09/1983

TRANSACTION: Certificate of Dissolution

DATE OF LAST MDC TRANSACTION:

02/08/1988

APPENDIX J

Lukens, St. Peter & Cooper
William M. Lukens
Alcoa Building, Suite 250
One Maritime Plaza
San Francisco, CA 94111
Telephone (415) 433-2261

Frederick E. Watson
A Professional Corporation
Frederick E. Watson
Glenn H. Wechsler
1990 N. California Blvd., Suite 630
Walnut Creek, California 94596
Telephone: (415) 947-0393
Attorneys for Plaintiff

In the Superior Court of the State of California
In and for the County of Sonoma

No. 112439

Irene O'Connell Kruse,
Plaintiff,

vs.

The Bank of America National Trust and Savings Association,
A National Banking Institution,
Defendant.

And Related Cross-Actions

Third Amended Complaint for Fraud, Intentional Infliction of Emotional Distress, and Intentional Interference With Prospective Economic Advantage.

[Filed July 16, 1985]

Plaintiff Irene O'Connell Kruse hereby complains of defendant the Bank of America National Trust and Savings Association, a National Banking Institution, as follows:

First Cause of Action for Fraud, By Plaintiff Irene O'Connell Kruse Against Defendant Bank of America:

1. At all times herein mentioned, defendant Bank of America National Trust and Savings Association ("Bank") was and is a corporation and a federally chartered national bank, engaged in the banking business. At all times herein mentioned, Raymond Timmerman ("Timmerman") was a Vice President of the Bank and head of the Regional Credit Office having jurisdiction over the Sebastopol branch. At all times herein mentioned up until September 30, 1979, William Sullivan ("Sullivan") was a Vice President of the Bank and Manager of the Sebastopol branch. At all times herein mentioned from December 23, 1979, onward, Roger Bunch ("Bunch"), was a Vice President of the Bank and Manager of the Sebastopol branch.

2. At all times herein mentioned, the James E. O'Connell Company, Inc. ("O'Connell Company"), was and is a corporation duly organized and existing under the laws of the state of California, which corporation owned and owns 72 acres of land located near the City of Sebastopol, Sonoma County, California, of which 57 acres were and are prime apple orchards. Two family residences were owned by the corporation and located on the said acreage in one of which the plaintiff and her husband resided and in the second of which resided their adult son, Daniel O'Connell.

3. All of the stock of the O'Connell Company was owned by its founder, James E. O'Connell, up until the time of his death in December 1971, following which, his widow, Irene O'Connell, the plaintiff herein, inherited all of the said stock.

4. The O'Connell Company was, at all times herein mentioned, up until 1981, engaged in the business of growing apples in its own orchards and operating a dehydrating plant in which it dried its own apples and additional apples purchased from other apple growers, and thereafter sold the dried apple products.

5. Following the death of his father in December 1971, Daniel O'Connell took over operation of the O'Connell Company and gradually built up the business until, in the year 1973, a net profit of $62,000 was made and the company was being operated soundly and profitably.

6. At all times herein mentioned up until 1983, the Sebastopol Cooperative Cannery ("Co-op") was a California corporation, operating as an apple growers co-operative near Sebastopol, and was in the business of processing and dehydrating apples which it received from the apple growers who were the members of the Co-op, and the Co-op was a business competitor of the O'Connell Company.

7. As of 1973, both the O'Connell Company and the Co-op had been banking customers of the Sebastopol branch of the bank, for over 20 years.

8. In the fall of 1973, the Regional Water Quality Control Board, with jurisdiction over the region that included Sebastopol, issued cease and desist orders to the O'Connell Company and the Co-op, requiring that each of those companies make expensive capital improvements to their waste water treatment facilities, within a specified time, or shut down their operations.

9. In 1974, the Co-op signed an agreement with a public agency to have issued $500,000 in bonds for construction of the required new waste water treatment facilities, and the bank underwrote the bond issue, with the first repayment of the loan due to be made July 1, 1975.

10. In May 1974, the Bank considered the O'Connell Company, under the management of Daniel O'Connell, to be a well-run, profitably operated company. The Bank realized and knew that the company needed a long term real estate loan to provide needed additional working capital, which had been depleted by use of working capital to construct the required waste water treatment facilities. The Bank considered the O'Connell Company to be creditworthy for such a long term real estate loan, and the Bank believed that there was no reason why the O'Connell Company would not be continued to be operated profitably in the future, under the management of Dan O'Connell, if the Bank gave the needed long term real estate loan, and continued to give the company its annual operating line of credit.

11. However, in May 1974, the Bank also knew that the Co-op had made the decision to build a new dehydration plant, with greatly increased capacity, and the Bank knew that it had already

underwritten the $500,000 in bonds for construction of the new waste water treatment facilities of the Co-op. Further, the Bank knew in May 1974 that the Bank intended to finance the construction of the Co-op's new plant, and that the supply of apples from the grower-members of the Co-op was insufficient to permit the contemplated larger plant to operate with economic efficiency, unless the Co-op could purchase each year, an additional amount of 15,000 tons of local apples, from non-member sources. The Bank further knew in May 1974 that so long as the O'Connell Company was in business and in competition with the Co-op, the Co-op would not be able to purchase the required additional local tonnage of apples for processing in the dehydrater. The Bank thus knew that the Co-op would not be able to operate with economic efficiency, and would not be able to repay the contemplated construction loan to be made to the Co-op by the Bank, unless the O'Connell Company went out of business or was put out of business. Therefore, the Bank, acting through Timmerman and Sullivan, decided in May 1974, to extend short term credit to the O'Connell Company, and later obtained security, for that short term credit, in the form of warehouse receipts for inventory to be produced by the O'Connell Company in the 1974 season, beginning in August 1974. The Bank further decided and planned that after it had so obtained security for the short term credit, the Bank would then cut off all credit to the company. The bank intended to do this in such manner that the O'Connell Company would not be able to pay its creditors, other than the Bank, and would be forced into bankruptcy and put out of business, so that the O'Connell Company would no longer be in competition with the Co-op.

12. In May 1974, the O'Connell Company applied for a long term real estate loan, but the Bank, pursuant to its plan and intention, refused to give the same, and instead forced the O'Connell Company to complete the financing of its new capital improvements for waste water improvement, and to finance its day to day operations, all out of operating income, plus overdraft financing supplied by the Bank, which overdraft financing reached an amount as high as $240,000, but which overdraft was completely paid off by January 29, 1975.

13. The Bank, acting through Sullivan and Timmerman, concealed from the O'Connell Company, the fact that the Bank intended to take all of the dried products from the 1974 season (August 1974 through January 1975) as collateral security, by means of having the dried product placed in a warehouse under warehouse receipts which could be assigned and pledged to the Bank, and then, after doing this, that the Bank would cut off all financing and credit to the company.

14. In February 1975, the Bank acting through Sullivan and a trust officer of the trust department of the Bank, caused and forced a creditor of the O'Connell Company, the Taylor-Doyle Company, to institute a lawsuit against the O'Connell Company, to recover the amounts due for apples sold to the O'Connell Company. The O'Connell Company let the suit go by default, believing that the Bank would give to the O'Connell Company, in May 1975, the annual operating line of credit which the Bank had given to the O'Connell Company each year for many years previously. The Bank concealed from the O'Connell Company and plaintiff that it had instigated the said lawsuit.

15. In May 1975, the Bank cut off all credit to the O'Connell Company, but thereafter the Bank made statements and representations to Dan O'Connell and the O'Connell Company which the Bank intended to, and did, lead Dan O'Connell and the O'Connell Company into believing that if the O'Connell Company would use all of its available income to continue to make payments to reduce the debt owed to the Bank, that the Bank would relent and give the long term real estate loan financing to the O'Connell Company, which it required to remain in business. Accordingly, the O'Connell Company and Dan O'Connell, so believing this, did use all of the available operating income of the company, to reduce indebtedness to the Bank and the O'Connell Company paid $78,000 to reduce indebtedness to the Bank, during the summer and fall of 1975, and therefore, because of using all available monies to pay down loans from the Bank, the company was not able to pay off the judgment held by the Taylor-Doyle Company, in the amount of $98,000.

16. In January 1976, a Sheriff's execution sale was scheduled to sell all of the O'Connell Company's property and assets, and

this sale was avoided at the last minute, only because George M. Jewell ("Jewell") borrowed $150,000 from the Bank and loaned that amount to the O'Connell Company, to pay off the Taylor-Doyle judgment which in turn enabled the Taylor-Doyle Company to pay off its indebtedness to a trust, of which the Bank was trustee. Jewell then became active in management of the O'Connell Company.

17. In December 1977, Jewell requested, but the Bank refused to give, a construction loan to the O'Connell Company, for construction of a new dehydration plant, and the Bank so refused because the Bank did not wish to finance construction of a new plant to compete with the Co-op's new plant, that the Bank was already financing. Jewell and the O'Connell Company then obtained a construction loan from another lender, a competitor of the Bank, and began construction of the O'Connell Company's new plant. The Bank learned of this and the Bank decided to get back into financing the O'Connell Company's new plant, in order for the Bank to be able to control the situation, and liquidate the O'Connell Company, to eliminate the competition for the Co-op.

18. Therefore, in late 1978, the Bank through Sullivan, represented to plaintiff that if, but only if, she would sell and transfer the controlling stock interest in the O'Connell Company to Jewell, then the Bank intended to, and would, provide the balance of construction financing required, and would then give the long term loan and financing, for the O'Connell Company's new dehydration plant, that was then under construction.

19. The said representation was false and misleading without qualification, and was known to the Bank to be so false and misleading, in that the Bank knew that it did not intend to give long term financing to the O'Connell Company, for the new plant, but rather intended to give short term loans to Jewell, who would in turn relean the money to the O'Connell Company on a short term basis, and the Bank knew that the O'Connell Company could not repay to Jewell, when due, the short term loans. The Bank further knew that it intended to obtain as security for the short term loans it was making, all of the assets of the O'Connell Company, by means of Jewell having the controlling stock interest, so that he could liquidate the O'Connell Company to pay

short term debt owed by the O'Connell Company to himself ("Jewell"), so that Jewell could repay his short term debt to the Bank. The Bank further knew that after obtaining such security, the Bank intended to refuse to give the long term financing, and to then force Jewell to exercise his control over the O'Connell Company (i.e. his majority shareholder control), to liquidate the O'Connell Company and to put it out of business and thus eliminate the O'Connell Company as a competitor of the Co-op, so that the Co-op could repay its indebtedness to the Bank.

20. The Bank further knew that the said representation of intention was misleading, because [it was] not qualified by disclosure of the material facts of the Bank's fraudulent, malicious and injurious conduct towards the O'Connell Company, in 1974-1975, when the Bank had obtained security and then cut off all credit.

21. The Bank intended to deceive plaintiff and induce plaintiff to transfer and sell a controlling stock interest in the O'Connell Company, to Jewell, in reliance upon the said false representation, and without knowledge of the said fraudulent and injurious conduct of the Bank towards the O'Connell Company in 1974-75.

22. Plaintiff justifiably relied upon the said false and misleading representation and believed it to be true, and transferred and sold fifty-one percent (51%) of the stock of the O'Connell Company to Jewell, on or about January 8, 1979, for $180. Plaintiff would not have so acted had she known the falsity of the said representation or had she known the material facts not disclosed, which qualified the representation made and made it misleading without disclosure of such material facts. Had plaintiff not so relied and transferred the controlling stock interest to Jewell, and relied upon the Bank for financing, the O'Connell Company would have obtained long term financing elsewhere, and the O'Connell Company would have gone forward profitably.

23. After completion of construction of the O'Connell Company's new dehydration plant, in June 1979, the Bank, acting through Timmerman, refused, in August 1979, to extend a long term real estate loan to the O'Connell Company, and the Bank later insisted in April 1980, upon Jewell liquidating the O'Connell

Company as a means of raising money for Jewell, which he could use to pay off his own short term indebtedness to the Bank. The O'Connell Company was forced into bankruptcy as a result.

24. As a direct and proximate result of plaintiff's said reliance upon the said fraudulent representations, plaintiff was damaged in the amount of $2.9 million, consisting in the difference between the value of 51% of the stock of the O'Connell Company, as of January 8, 1979, and $180 received by her in payment therefor, which stock became valueless thereafter, when the company was forced into bankruptcy by the Bank's aforesaid conduct. In addition, plaintiff lost dividends that plaintiff would have been paid by the O'Connell Company, on her stock, had she not been induced by the said fraud, to sell 51% of the stock, and had instead retained it, and she and her son Dan O'Connell, remained in control of the operation of the O'Connell Company, and obtained long term financing from another lender. Such long term financing could and would have been obtained, from another lender, but for the Bank's said fraud.

25. That in the premises, defendant acted with intentional fraud and intent to deprive plaintiff of property rights and to injure plaintiff, financially, and to cause unjust financial hardship to plaintiff, and defendant therefore acted with intentional fraud, and/or malice and oppression, so that plaintiff is entitled to recover from the defendant Bank, punitive damages in the amount of $100 million.

WHEREFORE, etc.

Second Cause of Action by Plaintiff Against Defendant Bank of America for Intentional Infliction of Emotional Distress:

26. Plaintiff incorporates by reference as though fully set forth, and realleges, paragraphs 1-23, inclusive, of the First Cause of Action above.

27. The Bank intended in 1975, to cause severe emotional distress to plaintiff, because of her fear and worry that the O'Connell Company would be bankrupted and residence would be sold, and she would be evicted and financially ruined. In the alternative, the Bank acted with a reckless and conscious disre-

gard of the rights of plaintiff, and a reckless disregard of the probability of causing severe emotional distress to the plaintiff.

28. As a direct and proximate result of the said outrageous conduct of the Bank, in 1974-1975, plaintiff suffered severe emotional distress from May 1975 to and including January 6, 1976, worrying about financial ruin and being evicted from her home, and plaintiff became particularly susceptible to emotional distress and worry about loss of her home and worry about financial ruin. The Bank learned of such severe emotional distress of plaintiff in 1975-1976, and knew of such particular susceptibility of plaintiff to emotional distress from such conduct, when the Bank later, in 1980, engaged in a repetition of such conduct.

29. In 1980, after the Bank had refused to grant the necessary long term financing to the O'Connell Company, the Bank forced Jewell to liquidate the O'Connell Company, and this in turn forced the O'Connell Company into bankruptcy. The Bank intended to cause severe emotional distress to plaintiff from worrying about loss of her home, and from fear of eviction from her home and financial ruin. In the alternative, the Bank acted with a conscious and reckless disregard of the rights of the plaintiff and of the probability of causing such severe emotional distress to her.

30. In so acting in 1979 and in 1980, the Bank acted through Vice President Timmerman, and Vice President Bunch, who was instructed and assigned by Timmerman and other officers of the Bank, to take over as manager of the Sebastopol branch and cause and bring about liquidation of the O'Connell Company to eliminate the company as competition for the Co-op.

31. As a proximate result of the said outrageous conduct by the Bank, plaintiff was caused to and did sustain severe emotional distress and worry, from early 1980 to and including the present time of the conclusion of the trial in this action, to plaintiff's damage in the sum of $500,000.

32. Defendant acted in the premises with the intent to cause severe emotional distress to plaintiff and to impose cruel and unjust hardship upon plaintiff, in conscious disregard of the rights of plaintiff, and the Bank thus acted with malice and oppression,

and plaintiff is entitled to recover $100 million in punitive damages against the Bank.

WHEREFORE, etc.

Third Cause of Action by Plaintiff Against Defendant Bank of America for Intentional Interference with Prospective Economic Advantage:

33. Plaintiff incorporates by reference paragraphs 1 through 23 of the First Cause of Action and paragraph 30 of the Second Cause of Action, and realleges the same as though fully set forth.

34. That after the said stock transfer and sale, there was a relationship of majority and minority shareholder between Jewell and plaintiff respectively, which relationship gave rise to a duty on the part of Jewell, as majority shareholder, not to act unfairly to place his own financial interests ahead of those of plaintiff.

35. This relationship contained the probability of economic benefit to plaintiff in that but for the intentional interference of the Bank, hereinafter alleged, Jewell would have performed his duties as majority shareholder of the O'Connell Company, and would have obtained long term financing for the O'Connell Company of the cost of construction of its new plant, and would have paid off the indebtedness of the O'Connell Company to himself, and returned the 51% controlling stock interest to the plaintiff, for $180, and plaintiff would have been restored to full stock ownership of the O'Connell Company, and would have received economic benefit in the form of dividends representing all of the profits of the O'Connell Company.

36. In the alternative, but for the interference and misconduct of the Bank, Jewell would have obtained from the Bank, a terming out of his short term indebtedness to the Bank, for a period of twenty years or more, and would have exercised his majority shareholder's position in the O'Connell Company, to cause and permit the O'Connell Company to term out its short term indebtedness to Jewell, over the same period of twenty years or more, and Jewell would have caused and permitted payment of dividends to plaintiff, by the O'Connell Company, representing profits after debt service.

37. The Bank had knowledge of the said existing relationship between plaintiff and Jewell of majority and minority shareholders of the O'Connell Company, and the relationship of debtor and creditor between the O'Connell Company and Jewell, and the Bank further had knowledge of the arrangement and agreement for return to plaintiff, of the 51% of the stock sold by plaintiff to Jewell, whenever the O'Connell Company indebtedness to Jewell was retired and paid off. With said knowledge, the Bank acted with the specific intent to disrupt the said relationship between plaintiff and Jewell, by declining and refusing to give reasonable long term real estate financing to the O'Connell Company, and by refusing to give reasonable long term twenty year or more terming out of Jewell's indebtedness to the Bank, and by forcing Jewell to exercise his majority shareholder's control in an improper manner, by liquidating the assets of the O'Connell Company. The Bank acted with the specific intent to disrupt the existing relationship between plaintiff and Jewell. The Bank further acted with the specific motive, purpose and intent, of liquidating and destroying the O'Connell Company, to eliminate it as a competitor for the Co-op, so the Bank could be repaid the debt owed by the Co-op to the Bank, because of the Co-op's being able to operate efficiently without the competition of the O'Connell Company. At the said time, in 1980, the Co-op was indebted to the Bank in excess of $20 million, whereas Jewell was indebted to the Bank only in the approximate amount of $3 million, and the Bank believed it was adequately secured and could receive payment in full of the said $3 million, if all of the assets of the O'Connell Company, and some or all of the assets of the Jewells, were liquidated.

38. As a direct and proximate result of the said wrongful interference by the Bank, Jewell began liquidating of the O'Connell Company, and it was forced into bankruptcy, and the relationship of minority and majority shareholder between plaintiff and Jewell, was disrupted to the extent that Jewell did not perform his duty and obligation as majority shareholder to act fairly and not place his own financial interests ahead of those of plaintiff, and Jewell was not able to, and did not, cause the O'Connell Company to repay its indebtedness to him, so that he could return the 51% controlling stock interest in the company, to the plaintiff.

39. That the Bank's said interference with and disruption of the said relationship between plaintiff and Jewell destroyed the value of plaintiff's stock in the O'Connell Company, and prevented payment of dividends to her by the O'Connell Company, all to plaintiff's damage in the sum of $2.9 million.

40. That in the premises, the Bank acted with the specific intent to cause financial injury to plaintiff and to impose cruel and unjust financial hardship upon plaintiff, and the Bank acted in conscious disregard of the rights of plaintiff, and the Bank thus acted with malice and oppression, and plaintiff is entitled to recover punitive damages against the Bank in the amount of $100 million.

WHEREFORE, plaintiff prays judgment against the defendant Bank as follows:

1. On the first cause of action:

   1.1. Compensatory damages in the amount of $2.9 million.

   1.2. In addition, punitive damages in the amount of $100 million.

2. On the second cause of action:

   2.1. Compensatory damages in the amount of $500,000.

   2.2. In addition, punitive damages in the amount of $100 million.

3. On the third cause of action:

   3.1. Compensatory damages in the amount of $2.9 million.

   3.2. In addition, punitive damages in the amount of $100 million.

4. For costs of suit, and for such other and further relief as may seem proper to the Court.

Dated: July 15, 1985.

Lukens, St. Peter & Cooper
Frederick E. Watson
A Professional Corporation

By: Frederick E. Watson

Attorneys for Plaintiff

APPENDIX K

BIOGRAPHY OF A BANK

The Story of Bank of America N.T. & S.A.

M.J. & B.R. James, Harper & Bros. 1954

p. 46

A section of the [Bank Act, 1909], not much noticed until Giannini began to take advantage of it, had to do with branch banking. Because of the distances in California there had long been a certain amount of branch banking by a few large country banks. Nothing in the laws prior to 1909 authorized or forbade it. The framers of the act of 1909 could hardly have foreseen branch banking as an important issue or they would

not have treated it in the negative way they did.

It was a comparatively simple matter for the Bank of Italy to bring itself within the terms of the new law.

p. 72

Birth of Statewide Branch Banking

Three years of whirlwind activity saw the bank's flag planted from Santa Rosa in the north to Ventura in the south, four hundred miles away. Between those geographical extremes ten other new rural branches were established. Moreover, the bank opened four branches in Oakland, across the bay from San Francisco, one in suburban Redwood City, and an additional branch in Los Angeles. By the end of 1918 only three banks in California topped the

Bank of Italy assets. The first statewide banking system in the United States was an accomplished fact.

p. 74

The 7 largest stockholders were: A.P. Giannini, 1081 shares; Dr. G.E. Caglieri, 700; William A. Newsom, 700 . . . .

p. 268

The Dream of Nationwide Banking

With the victory for statewide banking won in 1927, A.P. Giannini regarded as only half done the task of improving the country's banking system. The other half was to permit branch banks to cross state lines.

APPENDIX L

SAN FRANCISCO CHRONICLE

OCTOBER 19, 1933

NEWSOM, FIRST STATE BRANCH BANKER, DIES

MISSION DISTRICT LEADER LONG ACTIVE IN CIVIC AND BUSINESS LIFE

William A. Newsom, 68, Mission banker, died yesterday, following an illness of several weeks. He was the first manager of a branch bank in California. He established the Twenty-ninth and Mission branch of the Bank of America in 1907, and at the time of death was vice president and chairman of the advisory board.

MANY AFFILIATIONS

During his banking career of 25 years, Mr. Newsom was never too busy to give consideration to any who appealed

to him in distress, and his aid launched many a successful career.

After the fire in 1906, he was placed in charge of relief for the outer Mission district. During the administration of P.H. McCarthy as Mayor, he served as Commissioner of Public Works.

AIDED MANY CAREERS

Mr. Newsom was a director of Mary's Help Hospital, past president of the San Francisco Builders' Association, a member of the Elks, Knights of Columbus and Woodmen of the World.

Deceased was 68 years of age. He is survived by his widow, Mrs. Belinda D. Newsom; three sons, George W., William A. Jr. and A.C. Newsom, and three daughters, Mrs. Richard Reilly, Mrs. Irving Person and Mrs. P.A. Pencola.

APPENDIX M

THE ARK

Tiburon, California

Newspaper

November 2, 1988

The [International Bioethics] institute is a nonprofit organization located in modest offices at 250 Masonic Avenue, but backed by a board of directors composed of successful and influential local leaders.

In addition to President William Atchley, there are justice William A. Newsom of the California Appellate Court, vice president; Leland S. Prussia, former President of the Bank of America, treasurer; Steve Heilig, M.P.H., Staff Associate of the San Francisco Medical Society, secretary.

APPENDIX N

"NEWSFRONT"

BANKAMERICA CORPORATION

June 27, 1988

LOWER COSTS SET FOR CUSTOMLINE CREDIT ACCOUNTS

Bank of America will lower the cost of its CustomLine Credit and CustomLine Preferred accounts, effective July 9.

The CustomLine Credit account provides an unsecured personal line of credit from $3,000 to $10,000 for customers with total annual gross incomes of $40,000 or more.

CustomLine Preferred provides a credit line of up to $50,000 for those with incomes of $70,000 or more.

Together, these two accounts represent more than $1.5 billion in

unsecured lines of credit to Bank of America customers.

Each account carries a variable interest rate that changes monthly based on the published average interest rate for 1-month jumbo certificates of deposit (CD). The previous index used was based on the average rate of 3-month jumbos.

The interest spread over the newly adopted index has been reduced from 7.5 to 6.5 percent for CustomLine Credit and from 5 to 4.25 percent for CustomLine Preferred.

The annual fee also was reduced from $45 to $25 and minimum monthly payments will be lowered. This reduction became effective June 10. On outstanding balances of $3,000 or less, the minimum monthly payment will be $75, down from $200.

The new interest rates will be determined in early July, when the average 1-month jumbo CD rate is received from the Federal Reserve Board.

APPENDIX O

Civil No. A033064/A039161

Court of Appeal of the State of California
First Appellate District
Division One

Irene O'Connell Kruse,
Plaintiff, Respondent, and Cross-Appellant,
George R. Jewell and Charles Duck,
Trustee of the Bankruptcy Court of
George M. Jewell and Laura E. Jewell,
Cross-Complainants, Respondents,
Cross-Appellants, and Appellants,

v.

Bank of America National Trust and
Savings Association
Defendant, Appellant, Cross-Respondent,
and Respondent.

Appeal from the Judgments of the
Superior Court of the State of California
County of Sonoma
Honorable Laurence K. Sawyer, Judge

Memorandum of Points and Authorities in Support of
Plaintiff-Respondent and Cross-Appellant's Request
That the Justices of Division One Grant Rehearing
And Disqualify and Recuse Themselves

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Cross-Appellant Irene O'Connell Kruse

I

INTRODUCTION AND SUMMARY OF ARGUMENT

As shown hereinafter, Justice Racanelli owns stock in the Bank of America (the "Bank"), or has owned same during the time these appeals were pending before this Division and during the time that the Court ruled upon motions which had a significant bearing upon the decision of the appeals, and Justice Newsom has had a long-standing credit relationship with the Bank and, in 1987, solicited and received from the Bank, or was offered by the Bank, and he accepted, a revolving line of credit loan which had no stated maturity, but could be cancelled by the Bank at any time, and therefore the credit continued in effect at the discretion of the Bank.

Justice Racanelli and Justice Newsom declared their disqualification in another case involving the Bank at the time of oral argument of that other appeal in April 1986, and did so on the basis of the said stock ownership and lender/borrower relationship, but Justices Racanelli and Newsom have never offered to disqualify themselves in these present appeals, and did not make disclosure at the time of oral argument on these appeals. In addition, Justice Elkington was the third member of the panel on the other appeal involving the Bank heard in April 1986, but has never disclosed in these appeals the disqualification of Justices Racanelli and Newsom.

Accordingly, for the foregoing reasons, we submit that the decision of the Court is invalid, because a majority of the Court was disqualified, and the Court should grant rehearing for this reason, and the other reasons set forth in the Petitions for Rehearing; and the members of the Court should then recuse and disqualify themselves so that there may be reconsideration and decision of these appeals by another Division of the Court, or another District, as may be appropriate.

Because we recognize that the failure to disclose the disqualification of the members of the Court may have been due to inadvertence or oversight, and since we assume that the Court will be disposed to grant the request for rehearing and disqualification, we see no reason or necessity for making a public record at

this time of the request for rehearing and for recusal. We therefore request that the Court grant an order for filing these pleadings under seal and that the Members of the Court make immediate written disclosure to counsel for all parties of any facts which the Members of the Court feel bear upon possible grounds of disqualification.

Regardless of the manner in which the Court Members elect to handle or respond to the request for grant of rehearing on grounds of disqualification, we respectfully request immediate advice from the Court concerning its decision on the request for grant of rehearing on grounds of disqualification for the following reasons: If the request for rehearing and grounds for disqualification is granted, then counsel for plaintiff-respondent can take appropriate steps to request the Chief Justice to transfer the appeals to another Division of this Court or another District as may be appropriate.

On the other hand, if for reasons presently unknown to us and which we cannot anticipate, the Court should decline to grant rehearing on grounds of disqualification, then we submit that it is critical and essential that we be advised immediately so that we may take all necessary steps to supplement the plaintiff-respondent's Petition for Rehearing to include the additional ground of the decision of this Court lacking the concurrence of the required majority of qualified Judges because of disqualification of the Judges (Rule 29(a)(3)), and we may take any steps necessary to obtain evidence and confirmation of the disqualification of the Members of the Court. As the Court is aware, there are severe time constraints because this Court's jurisdiction to grant rehearing will expire on June 17, 1988, and the deadline for filing Petition for Review in the Supreme Court if rehearing is not granted by this Court is June 27, 1988.

In summary, there is conclusive disqualification of a majority of the panel because of financial interest. In addition, the entire panel is disqualified, we submit, under the rules announced in C.C.P. § 170.1(a)(6)(A), (B) and (C), which require Judges (including Justices) to disqualify themselves when, for any reason, the Judge believes his recusal would further the interest of justice, or the Judge believes there is a substantial doubt as to his

capacity to be impartial, or even where a third person, aware of the facts, might reasonably entertain a doubt that the Judge would be able to be impartial. Beyond this, the Code of Judicial Conduct, adopted by the Conference of California Judges, provides in Canon 3, subsection C that a Judge should disqualify himself when his disqualification is required by law *or* his impartiality might reasonably be questioned, including, but not limited to, instances where he has a personal bias or prejudice concerning (i.e. for or against) a party. The Commentary to subsection C points out that the Canon may require more disqualification than the statute (C.C.P. § 170.1) may require because of the need to maintain public confidence in the integrity and impartiality of the judiciary.

As shown in subsequent discussion, when tested by these very strict standards, the entire panel is disqualified and should grant rehearing to vacate the decision made by a disqualified panel, and the members of the panel should then recuse themselves to avoid even the *appearance* of being unable to be fair and impartial in judging these appeals.

II

GOVERNING LAW AND RULES

The *procedures* specified in C.C.P. § 170.1 *et seq.* (formerly C.C.P. § 170) apply only to trial court judges, but the *grounds* for disqualification specified in the statute apply to appellate court Justices, as well. *Giometti v. Etienne* (1934) 219 Cal. 687, 689; *Kaufman v. Court of Appeal* (1982) 31 Cal.3d 933, 937. Thus, when an appellate court Justice is presented with a request to disqualify himself, he decides the issue himself, rather than having an outside judge decide the issues, as is the procedure for disqualification of trial court judges. However, the appellate Justice still must make his decision based on the *same grounds* of disqualification.

C.C.P. § 150.1(a)(3) provides that a Judge (or Justice) is disqualified if he has a "financial interest" in the subject matter of the proceeding, or in a party. Section 170.1 is a 1984 statutory revision of former C.C.P. § 170 *et seq.* Section 170.1 thus repre-

sents the substitution of a general, or categorical, term (i.e., "financial interest") to encompass all financial interests, including, but not limited to, the specified or specific financial interests which were described in former C.C.P. § 170. Among the specific or specified financial interests set forth in former § 170 which disqualified a Judge were subsection (2) ownership of any capital stock, bond, note, or other security issued by a corporation which was a party to the action, and subsection (3) which provided for disqualification of the Judge if he is indebted, through money borrowed as a loan, to a party to the action. Accordingly, a Justice of an appellate court is financially interested, and thus disqualified, if he owns capital stock of a corporate party to the appeal, or if he is indebted on a loan to a party to the appeal.

C.C.P. § 170.1(a)(6) provides that a Judge is disqualified if:

> . . . for any reason (A) the judge believes his or her recusal would further the interests of justice, (B) the judge believes there is a substantial doubt as to his or her capacity to be impartial, or (C) a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial.

This standard for disqualification provided in C.C.P. § 170.1(a)(6)(C) establishes fundamentally an objective test and standard. It represents a legislative judgment that, due to the sensitivity of the question and inherent difficulties of proof, as well as the importance of public confidence in the judicial system, the issue is not limited to the existence of an actual bias. Rather, if a reasonable person would entertain doubts concerning the Judge's impartiality, disqualification is mandated. To ensure that proceedings appear to the public to be impartial and hence worthy of their confidence, the situation must be viewed through the eyes of the objective person. This standard indicates that the decision is not based on the Judge's personal view of his own impartiality. *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104. In *United Workers,* the Court holds:

> A judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. (170 Cal.3d 104.)

The Supreme Court confirms the paramount importance of maintaining public confidence in the integrity and impartiality of the judiciary in *People v. Thomas* (1972) 8 Cal.3d 518, where the Court states:

> The object of section 170 "is not only to guard jealously the actual impartiality of the judge but also to insure public confidence . . . . (8 Cal.3d 520.)

This same approach is taken and expanded upon and emphasized in the Code of Judicial Conduct adopted by the Conference of California Judges. Canon 3, subsection C provides:

> A judge should disqualify himself in a proceeding in which his disqualification is required by law, *or his impartiality might reasonably be questioned*, including but not limited to instances where:
>
> (a) He has a personal bias or prejudice concerning a party . . . .

The Commentary to Canon 3, subsection C provides:

> Because the Code emphasizes the appearance as well as the fact of propriety, Canon 3C(1)(a) may require more disqualification than the statute requires . . . .

III

APPLICATION OF LAW AND RULES TO FACTS OF THE PRESENT APPEALS

Since the disclosure statements filed by Justice Newsom indicate a continuing financial interest in the Bank of America up to and including the end of 1987, we submit that the panel is disqualified if influenced in its conferences and considerations of the appeals by even one disqualified member of the panel.

Moreover, we know of no evidence to change the statement made by Justice Racanelli that he owns stock in the Bank of America as of April 1986, and we know of no change in that condition or situation to and including the present date. Accordingly, Justices Racanelli and Newsom were disqualified at the time of hearing oral argument and later deciding the case, and the

decision should be vacated by grant of rehearing on grounds of disqualification of a majority of the panel.

We submit that a consideration of how the situation and facts would appear to the average person on the street necessarily results in a conclusion that such person would entertain a reasonable doubt as to the ability of the entire panel to be fair and impartial, based upon consideration of the following facts.

The decision of this case represents a complete departure from the usual rules of appellate review for the reasons set forth in the Petition for Rehearing. This Court's decision, rested as it is upon the incorrect conclusion that the evidence is insufficient to support the verdicts and judgments, constitutes a repetition of this Court's identical decision and reasoning in the *Sanchez-Corea* case, which was overturned by the decision of the Supreme Court, explicitly finding that there was sufficient and substantial evidence to support the verdicts and judgments.

In addition, a former Justice of this Court has been for several years employed by the Bank of America as its Director of Litigation. It is difficult to believe that the Members of this Court could have completely forgotten to announce their own disqualification at the oral argument, having in mind that two arguments had to be had in the *Sanchez-Corea* case because the pro-tem Justice, after the appeal had been under submission for two months, announced his disqualification because of his ownership of stock in the Bank.

In summary, we submit the entire panel is disqualified because, to the average person on the street knowing all of the foregoing facts, it would appear that there is a reasonable doubt as to the ability of the entire panel to be fair and impartial in passing upon these appeals. Accordingly, the panel should grant rehearing to vacate its decision, and disqualify and recuse itself.

Dated: June 10, 1988

Respectfully submitted,

Lukens, Cooper, Perry &
Drummond
William M. Lukens
Carol G. Perry

Frederick E. Watson,
A Professional Corporation
Frederick E. Watson

Khourie, Crew & Jaeger
Eugene Crew
Michael N. Khourie

By William M. Lukens

By F. E. Watson
Attorneys for Plaintiff,
Respondent and
Cross-Appellant
Irene O'Connell Kruse

PROOF OF SERVICE BY MAIL
[CCP § 1013a]

I, JENNIFER RYAN, hereby declare:

My business address is One Maritime Plaza, Suite 1600, San Francisco, California, in the City and County of San Francisco. I am over the age of eighteen years and I am not a party to the within cause. I am readily familiar with the practice of my office for collection and processing of correspondence for mailing with the United States Postal Service and correspondence deposited with the United States Postal Service that same day in the ordinary course of business.

On June 10, 1988, I served the attached Memorandum of Points and Authorities in Support of Plaintiff-Respondent and Cross-Appellant Irene O'Connell Kruse's Request That the Justices of Division One Grant Rehearing and Disqualify and Recuse Themselves by depositing a true copy thereof in a sealed envelope with postage fully paid in the United States Mail at San Francisco, California on the following at the addresses listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on June 10, 1988, at San Francisco, California.

Jennifer Ryan

Proof of Service List for *Kruse v. Bank of America*

Warren Christopher
Karen Growdon
O'Melveny & Myers
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A. Barry Cappello
Thomas G. Foley, Jr.
Frances E. Komoroske
Cappello & Foley
831 State Street
Santa Barbara, California 93101

APPENDIX P

DECLARATION OF DOLLY ARES

1. I am an attorney duly licensed to practice law before all the courts of the State of California and have personal knowledge of the following facts.

2. I was present at oral argument before the First District, Division One of the Court of Appeal on April 29, 1986. I was appearing as counsel for Respondent Richard E. Alexander in the case of Alexander v. Alexander, Case No. A023629, which was also on the calendar.

3. Prior to Alexander v. Alexander, another case was called which apparently involved the Bank of America. Prior to appellant's counsel beginning his oral argument, Presiding Justice Racanelli made a statement to the

effect that he owned a few shares in the Bank of America and should disqualify himself. Justice Newsom then stated that he had a loan from the Bank of America and did that disqualify him too? Appellant's counsel then stated he was willing to proceed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of June, 1988 at San Jose, California.

/s/ Dolly Ares

DOLLY ARES

DECLARATION

Calvin F. Gunn, under penalty of perjury, declares as follows:

I am an attorney licensed to practice in the State of California with my offices located at 2345 Yale Street, Palo Alto, California. On April 29,

1986, I was in attendance at the afternoon session of Division One of the Court of Appeal for the First Appellate District in San Francisco, in the case of Albert C. Johnson v. Daon Corp. I was awaiting my turn for oral argument and I recall that in connection with another oral argument which preceded mine, involving the Bank of America, one of the Justices on the panel stated that he owned some stock in the bank and the other Justice stated that he had a loan from the same bank, and that they were disclosing this information. I do not remember which Justice made which statement, but I do recall that Justices Elkington, Racanelli and Newsom were sitting on the panel that day because I made an oral argument in my case shortly thereafter.

The foregoing information is within my personal knowledge and if called as a witness, I could competently testify thereto.

Executed in Palo Alto, California, June 23, 1988.

/s/ Calvin F. Gunn

Calvin F. Gunn

DECLARATION

GUITY DEYHIMY, under penalty of perjury, declares as follows:

1. I am an attorney licensed to practice in the State of California, with my offices located at 220 Montgomery Street, Suite 1031, San Francisco, California.

2. On April 29, 1986, I was in attendance at the courtroom proceedings before Division One of the Court of Appeal of the First Appellate District

of San Francisco which included on calendar the case of Frank Barberis v. Bank of America. A matter in which I was involved as an attorney with Calvin Gunn, Esq. was Johnsen, et al. v. Daon Corp., which had also been scheduled for 9:00 a.m. on that day. I had also been scheduled to appear at a status conference, I believe, at 8:45 a.m. that same day in the Federal District Court for the Northern District of California, in the matter of Prescott v. Miller. I recall having requested that the federal matter be heard before others on that calendar so that I would be able to go across the street to observe the Court of Appeal in its decision-making process in the Johnsen case, scheduled for hearing or decision on the same day, although oral argument had been waived. I do not recall whether our matter was

heard in the morning or was continued into the afternoon calendar. While I was awaiting our case, I recall that one of the justices in another case, involving the Bank of America, offered to disqualify himself because of an interest he had in the Bank. I believe the Judge who offered to disqualify himself was Justice Racanelli. There was some discussion of the matter, when another judge made a similar statement, which was followed by some lighthearted comment regarding the pervasive presence of the Bank in California.

The foregoing information is within my personal knowledge, and if called as a witness I could competently testify thereto.

Executed this 6th day of July, 1988, at San Francisco, California

/s/ Guita Deyhimy

GUITA DEYHIMY

APPENDIX Q

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Attorneys for Plaintiff and Petitioner
Irene O'Connell Kruse

In the Supreme Court of the State of California

No. A033063/A039161

(Sonoma County Superior Court No. 112439)

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,

v.

Bank of America National Trust and Savings Association,
Defendant, Appellant, Cross-Respondent and Respondent

[Filed June 27, 1988]

Petition for Review
of Decision of the Court of Appeal
First Appellate District

TABLE OF CONTENTS

Page

Table of Authorities .....

Introduction .....

Questions and Issues Presented .....

Statement of the Case .....

Procedural Background .....

Argument .....

A. When A Court Of Appeal Rejects And Ignores The Basic Rules Of Appellate Review By 1) Not Reviewing The Actual Legal Theories Pleaded And Proven By Plaintiff, And Instead Reviewing Different Legal Theories Suggested By Defendant Bank, And 2) Not Reviewing The Evidence In The Light Most Favorable To The Verdict, Plaintiff Is Deprived Of Due Process And Equal Protection Under The Fourteenth Amendment Of The United States Constitution And Article I, Sections 7 And 16 Of The California Constitution .....

1. Plaintiff Has A Right To Due Process And A Jury Trial .....
2. The Jury Found That A Promise Had Been Made By The Bank .....
3. Division One Completely Ignored Plaintiff's Pleadings .....
4. Division One Completely Ignored Plaintiff's Pleadings .....
5. There Is A Need For Review To Enforce Plaintiff's Constitutional Rights To Due Process And Equal Protection Of The Laws, In A Fair Appellate Review .....

* * * * *

United States Constitution, Fourteenth Amendment, Due Process Clause .....

United States Constitution, Fourteenth Amendment, Protection Clause .....

INTRODUCTION

Filed in November of 1980, this case is one of the first, and perhaps the most important, of the lender liability cases in the United States. It casts a widowed farming lady, Mrs. Irene O'Connell Kruse, against the largest and most influential bank in the State of California, the Bank of America.

This petition seeks review of a shocking decision issued by Division One of the First Appellate District reversing a judgment in favor of Mrs. Kruse in the amount of $3.77 million, after a three month jury trial, and awarding costs to the Bank of America.

The panel was disqualified, and review must be granted under Rule 29(2) and (3), to vacate the void decision. Review must also be granted to vacate the decision because of a denial of due process and equal protection rights, by denial of a fair, just, and impartial appellate review.

This Court should in addition grant review of the merits of the appeals, rather than retransfer to the Court of Appeal for rehearing, because in light of the magnitude of the case, and its nationwide significance, review on the merits is dictated in order to settle important questions of law and to secure a uniformity of decisions.[1]

Mrs. Kruse's case represents the first major lender liability case to be presented to this Court *on the merits*, is already being cited throughout the country, and because of the bizarre and far reaching departure from appellate procedures and the disqualification of the panel mandates review by the Supreme Court of the State of California.

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[1] Opposing counsel has been quoted after the decision as saying that the decision "contained important rulings and clarifications that should have a significant effect in other pending lender liability cases." BNA Lender Liability News, Vol. I, No. 1, June 15, 1988, p. 9.

QUESTIONS AND ISSUES PRESENTED

1. Does it violate the plaintiff's due process and equal protection rights under the Fourteenth Amendment of the United States Constitution, and Article 1 § 7 of the California Constitution, when the Court of Appeal rejects and ignores the basic rules of appellate review, by (1) not reviewing the actual legal theories pleaded and proven by plaintiff, and instead reviewing different legal theories suggested by the defendant Bank, and (2) not viewing the evidence in the light most favorable to the verdict?

2. Was the Court of Appeal decision invalid because some or all of the justices were disqualified, so there was no concurrence in the decision by the required majority of qualified Justices or jurisdiction of the Court of Appeal?

3. May the Court of Appeal find inconsistency between the claims of Mrs. Kruse and the Jewells, when in fact they are *not* inconsistent and are easily reconcilable?

4. Is a bank liable for perpetration of intentional torts upon its customers or borrowers, to the same extent, no more, no less, than other intentional tortfeasors, even though the commission of the tort occurs during the initial Bank's attempts to advance its own business and banking interests, and thus falls within the scope of so-called lender-liability law?

STATEMENT OF THE CASE

In January of 1979, plaintiff Irene O'Connell Kruse, now 73 years of age, was fraudulently induced by the Bank of pledge control of her family business to a third party, the Jewell family, in reliance on the Bank's representation that it would provide long term financing for the expansion of her company's fruit and vegetable operations near Sebastopol, California. The company's properties included plaintiff's family homes and orchards. Mrs. Kruse pledged her controlling interest to the Jewells as the Bank requested, but the Bank refused to complete the promised financing, collapsing the business into bankruptcy and making it impossible for Mrs. Kruse to obtain the return of her stock.

In July of 1985, a Sonoma County jury awarded Mrs. Kruse the sum of $9.445 million, which included $2.67 million in compensatory damages for fraud and intentional interference with prospective economic advantage, $100,000 in compensatory damages for emotional distress, and $6.675 million in punitive damages. The trial judge, the Honorable Laurence K. Sawyer, on motion for new trial, upheld the compensatory awards, but reduced the punitive award to $1 million. Mrs. Kruse accepted the remittitur, but the Bank appealed the Judge's ruling and asked for a further reduction or reversal of the award, even as remitted. Mrs. Kruse filed a cross-appeal asking for reinstatement of the original award.

* * * * *

ARGUMENT

A. WHEN A COURT OF APPEAL REJECTS AND IGNORES THE BASIC RULES OF APPELLATE REVIEW BY 1) NOT REVIEWING THE ACTUAL LEGAL THEORIES PLEADED AND PROVEN BY PLAINTIFF, AND INSTEAD REVIEWING DIFFERENT LEGAL THEORIES SUGGESTED BY DEFENDANT BANK, AND 2) NOT REVIEWING THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO THE VERDICT, PLAINTIFF IS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 7 AND 16 OF THE CALIFORNIA CONSTITUTION

1. Plaintiff Has A Right To Due Process And A Jury Trial

On the Bank's appeal, plaintiff's judgment was reversed, on the ground that supposedly, as a matter of law, there was no substantial evidence to support the jury's verdict. The decision was rendered by a panel of Division One consisting of Presiding Justice Racanelli, and Associate Justices Elkington and Newsom.

In order to produce a result-oriented decision, the Court of Appeal blatantly ignored the evidence of the case, substituted the

Bank's facts in place of the plaintiff's facts, weighed the evidence and made factual rulings on the sufficiency of the evidence on the issues of liability, causation and reasonable reliance, refused to view the evidence as a whole, did not allow petitioner the benefit of her evidence, did not allow petitioner the benefit of all inferences and presumptions that could be drawn from the evidence and did not resolve all, or any, conflicts in the evidence in favor of petitioner or conform in any respect to the established rules governing appellate review. As if this were not enough, two members of the panel were required by law to disqualify themselves because of outright ownership of . . .

* * * * *

. . . apply to uniformity of fair and just *decision making process*, in the various Districts of the Court of Appeal. Beyond this, there is an even more fundamental reason why review of this Court is mandated in the present case. We respectfully submit that this Court, created under the California Constitution as the highest Court of the State, is charged with the duty of supervising the lower Courts, to insure that the federal and state constitutional rights of litigants in the Courts of California to a fair and just trial and appellate review are enforced, and not violated, by the lower courts. To that end, we submit, that this court must exercise its powers of review to correct and remedy any such violations of the fundamental constitutional right to fair trial and fair appellate review. Only by this means, can this Court maintain confidence in the integrity and impartiality of the California judicial system.

B. THE SUPREME COURT MUST REVIEW THIS DECISION TO VACATE THE INVALID AND VOID DECISION BY DISQUALIFIED JUDGES

Independently of the infringement of due process and equal protection constitutional rights, the Court of Appeal decision was and is invalid merely because one, two, or all three of the Justices were disqualified, for the reasons referred to above, and there was therefore not a qualified majority of Justices to concur in the decision, as required by Article 6, § 3 of the California State Constitution. Moreover, the decision by the disqualified Justices was not merely voidable, but rather void, and the law is settled

that there was therefore a lack of jurisdiction in the Court of Appeal to render the decision. *Giometti* . . .

* * * * *

For the reasons stated above, we respectfully request review by this court.

Dated: June 27, 1988

Respectfully submitted,

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In the Supreme Court of the State of California
No. S006208

Court of Appeal No. A033064/A039161

Sonoma County Superior Court No. 112439

Irene O'Connell Kruse,
Plaintiff, Respondent and Cross-Appellant,

v.

Bank of America National Trust and
Savings Association,
Defendant, Appellant, Cross-Respondent
and Respondent.

Plaintiff Petitioner Irene O'Connell Kruse's Memorandum of Points and Authorities In Reply to Opposition to Motion to Take Evidence Under Rule 23(b); and for Discovery

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ARGUMENT .....

1. This Court's Decision In *Kaufman v. Court of Appeal,* Does Not Prohibit, But Rather Mandates, The Taking Of Evidence On The Issue Of Disqualification .....
2. Moving Party Is Not Bound By The Statements Of Justice Racanelli And The Bank, Which, In Any Event Deal Only With One Part Of The Disqualification Question .....
3. A Prima Facie Showing Of Disqualification Of Justice Newsom Has Been Made, That Fully Justifies Taking Evidence And Discovery .....
4. There Is No Merit To The Bank's Contention That The Request For Disqualification Was Untimely .....

II. UNDER THE CONTROLLING LAW, THE JUSTICES WERE DISQUALIFIED IF THERE WAS AN APPEARANCE OF IMPROPRIETY; THEREFORE, JUDICIAL FACTUAL INVESTIGATION IS REQUIRED TO DETERMINE THE FACTS .....

III. THERE IS NO MERIT TO THE BANK'S ARGUMENT THAT NO PRIMA FACIE SHOWING OF DISQUALIFICATION HAS BEEN MADE, TO JUSTIFY TAKING EVIDENCE AND DISCOVERY ON THAT ISSUE .....

1. Deliberate Denial Of Due Process Is Sufficient In Itself, To Make Prima Facie Showing Of Disqualification .....
2. The Admissions Of Past Disqualifications Conclusively Show Present Disqualification, Or At Least Make A Prima Facie Showing Of Present Disqualification .....

* * * * *

. . . in *SCA Services, Inc., v. Morgan, supra*:

> ". . . This case raises important public issues concerning the interpretation and application of the [disqualification] statute and affecting public confidence and trust in the impartiality of the judicial system." (557 F.2d at 113)

The just-quoted words apply with full force to the present case, and the motion to take evidence must be granted. The request for discovery in advance of the evidentiary hearing should likewise be granted, because on issues of great public importance, where it is so critical to obtain all the facts bearing upon those issues, the consensus of modern day courts is that the search for truth is greatly facilitated and expedited, by having discovery in advance of the evidentiary hearing.

III

THERE IS NO MERIT TO THE BANK'S ARGUMENT THAT NO PRIMA FACIE SHOWING OF DISQUALIFICATION HAS BEEN MADE, TO JUSTIFY TAKING EVIDENCE AND DISCOVERY ON THAT ISSUE:

The Bank argues that moving party, Mrs. Kruse, has supposedly not produced evidence sufficient to make prima facie showing, that would warrant a judicial factual investigation into the issue of disqualification. (B.Opp. 2-3) This argument is completely erroneous.

1. Deliberate Denial of Due Process is Sufficient in Itself, to Make Prima Facie Showing of Disqualification:

As shown in Plaintiff's Petition for Review (pp. 12-15), the Court of Appeal Justices did not review the legal theories and causes of action pleaded by plaintiff, and on which she recovered verdict and judgment. Rather, the Court reviewed subtly altered and distorted *variations* of plaintiff's legal theories, which were supplied and suggested to the Court, by counsel for the Bank in its briefs. Those "strawman" arguments were then set up by the Court in its opinion, and just as quickly knocked down, since there was no evidence in the record to support those counterfeit theories. The Court then ignored plaintiff's actual legal theories,

and completely disregarded the abundant evidence in the record to support plaintiff's verdict and judgment. This basing of the appellate decision on theories and issues different from those relied upon in the Trial Court, was a flagrant denial of due process. Due process does not require the state to make any appeal process available, but when appeal process is made available, it is part of the "process" which must be "due," and the appellate review must be applied equally, and not arbitrarily. *Frank v. Mangum*, 237 U.S. 309, 327; 59 L.Ed. 969, 980 (1915); *National Union of Maritime Cooks and Stewards v. Arnold*, 348 U.S. 37, 43; 99 L.Ed 46 (1954). Therefore, as held by the Supreme Court in *Cole v. Arkansas*, 333 U.S. 196; 92 L.Ed. 644 (1948):

> "... To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised [on appeal] *on consideration of the case as it was tried and the issues were determined in the trial court.*" (333 U.S. at 201; 92 L.Ed. at 648, emphasis added)

The rule is the same in civil as well as criminal cases. Thus, in *Spevack v. Kline*, 385 U.S. 511; 17 L.Ed.2d 574 (1967), a New York attorney was required, under State Bar Rules to keep records concerning his contingent fee cases, and he was disbarred when he refused to produce financial records, on grounds of self-incrimination. The disbarment was ordered on the theory that the privilege against self-incrimination *did* apply to the records, but an attorney could be disbarred for invoking the privilege to not produce the records. The New York Court of Appeals affirmed the disbarment on the different theory that the privilege did *not* apply to the records in the first place. In reversing, the Supreme Court held:

> "... The Court of Appeals was the first to suggest that the privilege against self-incrimination was not applicable *to the records*. Petitioner, however, had been disbarred on the theory that the privilege was applicable *to the records*, but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole v. Arkan-*

sas, 333 U.S. 196, 201 . . . " (385 U.S. at 518; 17 L.Ed.2d at 579, emphasis in the original)

The denial of due process by basing the appellate decision on legal theories and causes of action different than those pleaded and recovered on in the Trial Court, was compounded by the refusal of the Court of Appeal to weigh the evidence in the light most favorable to the verdicts and judgments. This was an exact repetition by Division One, of its wrongful conduct in *Sanchez-Corea v. Bank of America*. Moreover, when this violation of due process was brought to the attention of the Court of Appeal by Petition for Rehearing, the reaction of the Court was not to grant rehearing and review the issues and theories on which plaintiff recovered verdict; rather, the Court rendered a modified opinion upon denial of rehearing, and inserted a finding that the evidence was supposedly insufficient to show justifiable reliance by the plaintiff (an elderly widow) on the fraudulent representations of the Bank. That issue had *never* been raised by the Bank in the Trial Court, or even on appeal, since the Bank always conceded that plaintiff justifiably relied, and the Bank only disputed whether it had made the alleged misrepresentations. This greatly aggravated denial of due process.

A disinterested observor of the foregoing conduct could reasonably conclude that the actions were a deliberate denial of due process to the plaintiff, and a favoring of the Bank, and thus conclude that there was at the very least, a reasonable doubt of the impartiality of the Justices. Thus, a prima facie showing of disqualification may rest upon this conduct alone.

2. The Admissions of Past Disqualification Conclusively Show Present Disqualification, Or at Least Make a Prima Facie Showing Of Present Disqualification:

At the outset, as shown in Plaintiff-Petitioner's Opening Memorandum in support of the present motion, if her argument of non-repeal of former CCP § 170, as to *appellate court Justices,* is accepted, and that former statute is still in effect as to appellate Justices, then any debtor or creditor relationship to a party is absolutely disqualifying, and both Justices Racanelli and New-

som, by their own admission had a debtor relationship to the Bank, and were absolutely disqualified to hear these appeals.

Moreover, even assuming this Court should decide that former CCP § 170 was repealed, even as to appellate court Justices, the admissions by Justices Racanelli and Newsom of their past disqualification, and the failure of both Justices to offer any explanation.

* * * * *

. . . first made a full written disclosure on the record, of the basis for disqualification; and that of course did not happen in this case.

Dated: July 21, 1988

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In the Supreme Court of the
State of California

No. S006208

Court of Appeal No. A033064/A039161

Sonoma County Superior Court No. 112439

Irene O'Connell Kruse,
Plaintiff and Respondent,

George R. Jewell and Charles Duck, Trustee of the Bankruptcy Estate of George M. Jewell and Laura E. Jewell,
Cross-Complainants and Respondents,

v.

Bank of America, N.T.&S.A.
Defendant, Cross-Defendant and Appellant.

[Filed July 27, 1988]

Reply to Answer to Petition for Review

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TABLE OF CONTENTS

Page

I

INTRODUCTION 1

1. Plaintiff's Claims of Disqualification and Violation of Her Constitutional Rights Are Meritorious and Asserted in Good Faith 1
2. It is Necessary and Proper to Include in This Reply Matters Which Go Beyond Response to New Issues Raised in the Answer 2

II

THE PROCEDURAL RULE RESTRICTING THIS REPLY TO DISCUSSION OF NEW ISSUES RAISED IN THE ANSWER, MAY BE DISREGARDED, BECAUSE ISSUES OF GREAT PUBLIC IMPORTANCE ARE INVOLVED HERE 4

III

IT IS MANDATORY THAT THIS COURT GRANT REVIEW AND EXERCISE JURISDICTION TO ENFORCE AND PROTECT PLAINTIFF'S FEDERAL CONSTITUTIONAL RIGHTS 4

IV

PLAINTIFF'S CLAIMS OF VIOLATION OF HER FEDERAL CONSTITUTIONAL RIGHTS, ARE SOUND IN LAW AND ON THE FACTS 7

A. Plaintiff was Denied Due Process By The Court of Appeal's Basing Its Decision on Legal Theories Different From Those Pleaded and Recovered On In the Trial Court 7
B. Plaintiff was Denied Equal Protection By The Court of Appeal's Refusal to View The Evidence in The Light Most Favorable to Her Verdict 11
C. Plaintiff was Denied Due Process if Even One Justice was Disqualified 13

V

THE BANK'S NEW ISSUE IS WITHOUT MERIT ... 13

I

INTRODUCTION

Under Rule 28(d) where the Answer to a Petition for Review ("Petition") presents additional issues for review, a Reply to the Answer is permitted, limited to those additional issues. The Bank's Answer does present additional issues, and this Reply is filed to respond to those additional issues. In addition, on the unusual facts of this case, it is necessary and proper to include vitally important expansions upon, and additions to, the legal and factual arguments set forth in the Petition, as will be shown below. First, however, an important preliminary matter needs to be discussed.

1. Plaintiff's Claim of Disqualification and Violation of Her Constitutional Rights Are Meritorious and Asserted in Good Faith:

The Bank falsely implies that there was no error in the Court of Appeal's decision, and that counsel for plaintiff have resorted to making false and "irresponsible" charges against Justices Racanelli and Newsom, for some reason. (B.Ans. 2 and 27) The apparent reason for this personal attack upon counsel for Plaintiff is to prejudice her counsel in the eyes of this Court and prevent grant of review. If this is the Bank's purpose, it is destined to fail.

The Supremacy Clause of the United States Constitution makes it *mandatory* for this Court to grant review and exercise its jurisdiction to decide Plaintiff's contention that the Court of Appeal deprived her of property (i.e., her $4 million judgment) without due process of law, and without equal protection of the laws, in violation of her federal constitutional rights, and that the decision of the Court of Appeal is therefore invalid and must be vacated. The duty and obligation of this Court to hear and decide those federal constitutional claims exists regardless of this Court's ultimate decision on those constitutional issues.

Despite the fact that the Bank's unfounded attack upon counsel for Plaintiff cannot prevent grant of review, we do not wish to allow that unfounded attack to go unanswered. We have asserted the issues regarding disqualification and violation of constitutional

rights in good faith and because we believe that this Court will find those contentions to be true. We take no pleasure in making such charges, and would greatly prefer not having had to assert them, but since the grounds for disqualification exist, and the violations of constitutional rights occurred, and have most certainly influenced, if not dictated the bizarre reversal of Plaintiff's judgment, we are under a duty to prevent further gross injustice to Plaintiff. The Bank's argument that we have made charges against the Justices which we cannot prove is a completely specious argument. Neither Mrs. Kruse nor her attorneys would gain *anything* by obtaining review, unless this Court then found her claims to be true.

2. It is Necessary and Proper to Include in This Reply Matters Which Go Beyond Response to New Issues Raised in the Answer:

It is necessary and proper[1] to include in this Reply, arguments which go beyond response to new issues asserted in the Bank's Answer, for the following reasons:

The original decision was filed May 18, 1988. Thereafter, we were engrossed in filing the Petition for Rehearing, and the Request for Disqualification, and amendments thereto, until June 17, 1988, when the Court of Appeal denied both the Petition and the Request. In the ten days remaining before the Petition for Review had to be filed in this Court, it was simply not possible to fully prepare, and fully present in the Petition, what amounted to a whole new "case," on the issues of disqualification of the Justices and their violation of Plaintiff's constitutional rights.

To illustrate, we requested the Justices to make full disclosure on the record of all facts bearing upon their alleged disqualification, but they refused to do so, and we therefore included in the Petition the facts and information which we had available at that time. Subsequent to filing the Petition, our continuing legal research and factual investigation has yielded further evidence to support the claim that the Justices were biased in favor of the Bank, including the startling discovery of Justice Newsom's close

---

[1] See discussion of Authorities at page *infra*.

family ties to the Bank of America, which he has consistently to this day, concealed and never disclosed. Justice Newsom's grandfather, William A. Newsom, was one of the founding shareholders and officers of the Bank of America (Bank of Italy) whose shareholderings in 1918 were second in number only to those of the Bank's founder, A. P. Giannini. William A. Newsom became the Branch Manager for the very first Branch Office of the Bank, and finished a 23-year career with the Bank as Vice President and Chairman of the Advisory Board of the Bank. Justice Newsom's father, William A. Newsom, Jr., and Justice William A. Newsom himself, carried on the close relationship to the Bank. (See Exhibit "A" attached hereto.)

Therefore, we have included hereinafter, additional legal and factual support for Plaintiff's claims, which has been developed by legal research and factual investigation subsequent to the filing of the Petition.

II

THE PROCEDURAL RULE RESTRICTING THIS REPLY TO DISCUSSION OF NEW ISSUES RAISED IN THE ANSWER, MAY BE DISREGARDED, BECAUSE ISSUES OF GREAT PUBLIC IMPORTANCE ARE INVOLVED HERE:

In this case, the issues of disqualification of the Justices of the Court of Appeal, because of alleged conflict of interest, and bias and prejudice, are issues which concern and affect public confidence in the integrity and impartiality of the judiciary, and are therefore issues of great public importance. In such cases, the usual procedural rules may be disregarded. *Roe v. Wade* (1973) 410 U.S. 113, 35 L.Ed.2d 147, 161 [Moot case on appeal will still be decided if issues of great public importance]; *Kinnear-Weed Corp. v. Humble Oil & Refining Co.*, 403 F.2d 437 (5th Cir. 1968):

> "... But, as we several times make clear, this is a matter which transcends the interests of the parties. The purity of the judicial process and its institutions is the thing at stake. Whatever might be the usual consequences of res judicata,

collateral estoppel or doctrines akin to them, we reject them here. They are not a bar or defense here or below." (403 F.2d at 439-440)

Accordingly, we will discuss later the additional issues presented in the Bank's Answer, and will first discuss additional, vitally important and controlling points, such as the fact that the Supremacy Clause makes it mandatory for this Court to grant review and exercise jurisdiction.

III

IT IS MANDATORY THAT THIS COURT GRANT REVIEW AND EXERCISE JURISDICTION TO ENFORCE AND PROTECT PLAINTIFF'S FEDERAL CONSTITUTIONAL RIGHTS:

Article VI of the United States Constitution contains the Supremacy Clause, and a clause which requires every judicial officer in the nation to take an oath of office to uphold and enforce the federal constitution.[2]

Article 20 § 3 of the California Constitution, implements Article VI of the Federal Constitution, by prescribing an oath of office to be taken by all Judges and Justices to support and defend the federal Constitution.

In *Cooper v. Aaron,* 358 U.S.1; 3 L.Ed.2d 5, (1958), the Court holds that the federal Constitution *as construed by the United States Supreme Court* ("Supreme Court"), is the supreme law of the land, and that:

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[2] The pertinent language is as follows:
". . . This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, and Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
. . . [A]ll executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . "

> " . . . No state . . . judicial officer can war against the Constitution without violating his undertaking to support it." (358 U.S. at 18; 3 L.Ed.2d at 17)

In *Martin v. Hunter's Lessee,* 1 Wheat. 304, 339; 4 L.Ed. 97, 106 (1816); *Claflin v. Houseman,* 93 U.S. 130, 136-137; 23 L.Ed. 833, 838-839 (1876); and the *Second Employer Liability Cases,* 223 U.S. 1, 58; 56 L.Ed. 327, 349 (1912), the Supreme Court establishes the law that every state court of competent jurisdiction, has a *mandatory* duty to exercise its jurisdiction over and to decide, claims based upon rights granted under the federal Constitution or federal statutes. In *Miller v. Municipal Court* (1943) 22 Cal. 2d 818, this Court, citing the Supremacy Clause, as construed by the Supreme Court in the foregoing cases, held:

> ". . . But, considering the intent of the framers of the Constitution, the acts of the early Congresses, and the provisions of Article VI establishing the supremacy of federal law, it seems clear that a state court, otherwise competent to exercise jurisdiction over the subject-matter, the parties, and the amount in controversy, *must assume jurisdiction of an action created by federal law* and enacted pursuant to a legitimate federal function, regardless of whether or not that action be considered either as penal or as furthering the governmental interest.
>
> Any argument of hardship which, it may be asserted, will result from the additional burden of litigation in state courts, must be considered settled by the Supreme Court of the United States. 'We are not disposed,' the court observed, 'to believe that the exercise of jurisdiction by the state courts will be attended by any appreciable inconvenience or confusion; but, be this as it may, if affords no reason for declining jurisdiction conferred by law. *The existence of the jurisdiction creates an implication of duty to exercise it,* and that its exercise may be onerous does not militate against that implication.' . . ." (22 Cal.2d at 851, emphasis added)

Accordingly, plaintiff has a right, guaranteed under the federal Constitution, not to be deprived of property (i.e. her $4 million judgment against the Bank), by the Court of Appeal, without due

process of law, or without equal protection of the laws. Therefore, she has a claim or cause of action, created by federal law, to vacate and reverse the decision of the Court of Appeal, which deprived her of her judgment-property, in violation of her federal constitutional rights. The sole and only California Court which has jurisdiction to review and reverse the decision of the Court of Appeal, is this Court. Therefore, this Court, in its own words, "must assume jurisdiction of an action created by federal law."

IV

PLAINTIFF'S CLAIMS OF VIOLATION OF HER FEDERAL CONSTITUTIONAL RIGHTS, ARE SOUND IN LAW AND ON THE FACTS:

A. Plaintiff was Denied Due Process By The Court of Appeal's Basing Its Decision on Legal Theories Different From Those Pleaded and Recovered On In the Trial Court:

As shown in Plaintiff's Petition (pp. 12-15) the Court of Appeal did not review the legal theories and causes of action pleaded by plaintiff, and on which she recovered verdict and judgment. Rather, the Court reviewed subtly altered and distorted *variations* of plaintiff's legal theories, which were supplied and suggested to the Court, by counsel for the Bank in its briefs. Those "strawman" arguments were then set up by the Court in its opinion, and just as quickly knocked down, since there was no evidence in the record to support those counterfeit theories. The Court then ignored plaintiff's actual legal theories, and completely disregarded the abundant evidence in the record to support plaintiff's verdict and judgment. This basing of the appellate decision on theories and issues different from those relied upon in the Trial Court, was a flagrant denial of due process. Due process does not require the state to make any appeal process available, but when appeal process is made available, it is part of the "process" which must be "due", and the appellate review must be applied equally, and not arbitrarily. *Frank v. Mangum,* 237 U.S. 309, 327; 59 L.Ed. 969, 980 (1915); *National Union of Maritime Cooks and Stewards v. Arnold,* 348 U.S. 37, 43; 99 L.Ed. 46

(1954). Therefore, as held by the Supreme Court in *Cole v. Arkansas,* 333 U.S. 196; 92 L.Ed. 644 (1948):

> "... To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised [on appeal] *on consideration of the case as it was tried and the issues were determined in the trial court.*" (333 U.S. at 201; 92 L.Ed. at 648, emphasis added)

The rule is the same in civil as well as criminal cases. Thus, in *Spevack v. Kline*, 385 U.S. 511; 17 L.Ed. 2d 574 (1967), a New York attorney was required, under State Bar rules to keep records concerning his contingent fee cases, and he was disbarred when he refused to produce the financial records, on grounds of self-incrimination. The disbarment was ordered on the theory that the privilege against self-incrimination *did* apply to the records, but an attorney could be disbarred for invoking the privilege to not produce the records. The New York Court of Appeals (the highest Court in New York) affirmed the disbarment on the different theory that the privilege did *not* apply to the records in the first place. In reversing, the Supreme Court held:

> "... The Court of Appeals was the first to suggest that the privilege against self-incrimination was not applicable *to the records.* Petitioner, however, had been disbarred on the theory that the privilege was applicable *to the records*, but that the invocation of the privilege could lead to disbarment. His disbarment cannot be affirmed on the ground that the privilege was not applicable in the first place. *Cole v. Arkansas*, 333 U.S. 196, 201..." (385 U.S. at 518; 17 L.Ed. 2d at 579, emphasis in the original)

Plaintiff in her Petition (pp. 12-15) points out specifically how the Court of Appeal failed and refused to review the sufficiency of the evidence to support *the actual causes of action pleaded* by plaintiff, and on which she recovered verdict and judgment. The Bank in its Answer to the Petition ("B.Ans.") does *not* deny this argument, and instead tacitly admits that the Court of Appeal based its decision on different theories than those pleaded by plaintiff. But the Bank then makes the specious argument that plaintiff was not aggrieved by this error, because (according to

counsel for the Bank) the evidence was insufficient, as a matter of law, to support the verdict, even on the theories pleaded by plaintiff. (B.Ans. 25-27)

There are two obvious fallacies in this argument. First, it is only counsel for the Bank who state that the evidence was insufficient to support the verdict even on the theories actually pleaded by plaintiff. By contrast, the *Court of Appeal* never reached that conclusion, because the Court of Appeal never reached that issue, since it never reviewed the sufficiency of the evidence to support the legal theories and causes of action actually pleaded by plaintiff. Implicit in the argument by counsel for the Bank, is the suggestion that the Court of Appeal would still have found the evidence insufficient to support the actual theories pleaded by plaintiff, if the Court of Appeal had reviewed those. This suggestion is at best unfounded speculation (that the Court of Appeal would have reached the same result upon a different review); and at worst it is an admission that the Justices were biased in favor of the Bank and were going to reverse plaintiff's judgment no matter what kind of review they conducted, and regardless of what the law and the facts were.

Second, and more fundamentally, the evidence is more than sufficient to support the causes of action and legal theories actually pleaded by Plaintiff. This is readily illustrated by examination of Plaintiff's cause of action for unjustified interference with prospective economic advantage, as pleaded in her Third Amended Complaint ("TAC"), copy of which appears as pages 589-604 of the Bank's Appellant's Appendix ("A.A."). The TAC pleads the interference was in two stages, and with two relationships. First, it is pleaded that the Bank, as a *third party* interfered with Plaintiff's relationship with, and her control over, her solely-owned corporation by inducing her to transfer and pledge controlling stock interest to Jewell, by false representation of the Bank's intention to give long-term financing to the company; and that but for her loss of control, the company would have obtained the long-term financing from another lender, and gone forward profitably.

Second, it is pleaded that the Bank as a *third party* interfered with the relationship between Plaintiff as pledgor and Jewell as pledgee, by refusing to give the long-term financing it had

represented it would give, and doing that with the intention to put the company out of business, to eliminate it as competition for the Co-op, thereby making it impossible for the company to repay its debt to Jewell, and thus preventing Plaintiff's redeeming her stock pledged as security for repayment of that debt, and denying Plaintiff the economic advantage resulting from redemption of her stock and resumption of her receipt of dividends and shareholder distributions from the company.

However, the Bank suggested, and the Court of Appeal accepted, a false "strawman" argument that the relationship pleaded as having been interfered with, was a two-party relationship between the Bank and the company; and that by refusing to make a long-term loan to the company, the Bank did not act as a *third party* interfering with Plaintiff's relationship to anyone, and the evidence therefore failed to support the interference cause of action. The Court of Appeal thus reviewed and reversed on a theory totally different from that pleaded, thereby denying Plaintiff due process.

Comparison of the other causes of action, as pleaded in the TAC, with the Court of Appeal's opinion, discloses the same review on theories different from those pleaded, as to all causes of action, with resultant denial of due process in the review of all causes of action on which Plaintiff recovered.

B. Plaintiff was Denied Equal Protection By The Court of Appeal's Refusal to View The Evidence in The Light Most Favorable to Her Verdict:

In *Lindsey v. Normet*, 405 U.S. 56, 77; 31 L.Ed. 2d, 36, 52; and *National Union v. Arnold*, 348 U.S. 37, 43; 99 L.Ed. 46 (1954), the Supreme Court holds that while the Fourteenth Amendment does not require a state to provide appellate review, where appeal is afforded, the appellate review must be applied equally, and not arbitrarily, or the equal protection clause is violated. Thus, equal protection was denied when Division One applied the standard rule of appellate review and viewed the evidence in the light most favorable to the judgment in all cases *except* in *Sanchez-Corea v. Bank of America* and in the present Kruse/Jewell appeals.

Here again, the Bank's Answer does *not* deny the accusation that the Court of Appeal failed to view the evidence in the light most favorable to the judgment. Rather, the Bank sidesteps the issue and advances the diversionary argument that there is no requirement that the reviewing Court adopt all or any portion of a Respondent's statement of facts, since, as held in *People v. Johnson*, 26 Cal.3d 557, 577, the reviewing Court must review the whole record and cannot focus entirely on isolated pieces of evidence. But *People v. Johnson* itself recognizes that the reviewing Court must review the whole record in the light most favorable to the judgment. (26 Cal.3d at 577)

The evidence must be viewed in the light most favorable to supporting the implied fact findings of the jury, which arise from *the pleadings. Price v. Bekins Van & Storage* (1918) 179 Cal. 326, 328.

The TAC pleads the facts showing the tortious and reprehensible wrongdoing conduct of the Bank, and the jury's verdict implies a finding that those pleaded facts were true. Plaintiff survived a motion for summary judgment before trial, a motion for nonsuit during trial, and a motion for new trial after trial; thus conclusively indicating there was more than substantial evidence when viewed in the light most favorable to the Plaintiff's case and her verdict.

Despite all this, the original and the modified opinions of the Court of Appeal *do not contain even one single fact* showing wrongdoing, or even hinting at wrongdoing, on the part of the Bank. This conclusively demonstrates that the Court of Appeal viewed the evidence in the light most favorable to the Bank, but thus violating Plaintiff's right to equal protection.

C. Plaintiff was Denied Due Process if even One Justice was Disqualified:

It is a denial of due process under the Fourteenth Amendment, if even one appellate Justice on a panel is disqualified. *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 824, 829-833; 89 L.Ed.2d 823, 834-840 (1986); *Moles v. Regents of University of California* (1982) 32 Cal.3d 867, 873-874. The Bank errs in arguing that *financial interest* is the only basis for disqualification. (B.Ans. 6-

7) A non-financial *relationship* can give rise to a reasonable appearance of partiality, and this is disqualifying. *Liljeberg v. Health Services Acquisition Corp.* (U.S. Supreme Court No. 86-957, June 17, 1988). California Daily Opinion Service, 88 C.D.O.S. 4259, 4261-4262. As shown in Plaintiff's points and authorities in support of her Rule 23(b) Motion to Take Evidence there is an overwhelmingly strong prima facie case of disqualification, based on hearsay which can be converted to admissible evidence by an evidentiary hearing.

In summary, there are valid and substantial claims and contentions of violation of Plaintiff's federal constitutional rights, and we respectfully submit that it is therefore mandatory for this Court to grant review and exercise jurisdiction over the said claims and contentions.

V

THE BANK'S NEW ISSUE IS WITHOUT MERIT:

The Bank states it raises no new issues for review (B.Ans. 1), but in a footnote on that same page, contradicts that statement by asserting that if a review is granted, the Bank wishes review of additional points. The Bank then argues that neither Mrs. Kruse nor the Jewells seeks review on the merits. This is essentially correct, because both Mrs. Kruse and the Jewells seek to vacate the Court of Appeal's decision entirely, so there would then be no decision for this Court to review on its merits, or lack of same.

But the Bank then goes on to argue that the Court of Appeal "correctly applied settled rules of tort law". (B.Ans. 1-2) Were we to let that statement go unchallenged, it could be taken to be a concession that despite any disqualification of the Justice, and despite any violation of constitutional rights, the Court of Appeal reached a fair and just result, so there is no need for grant of review.

That is obviously false, and we strongly dispute the Bank's statement. The Court of Appeal did *not* correctly apply tort law rules, and not all of the tort law rules applicable can be regarded as "settled".

Dated: July 27, 1988

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July 29, 1988

The Honorable Acting Chief Justice
Of California
And The Honorable Associate Justices
Of the Supreme Court of California
4250 State Building
San Francisco, CA 94102

Re: Kruse/Jewell v. Bank of America, S006208

Dear Acting Chief Justice:

This letter brief is submitted to the Court, as a supplement to the Petition for Review filed by Plaintiff-Petitioner Irene O'Connell Kruse, and is submitted for the following reasons:

1. To perfect the record for appeal to the United States Supreme Court, under 28 U.S.C. § 1257(2), by drawing into question the validity of Rule 29, on the ground of its being repugnant to Article VI of the United States Constitution, if Rule 29 is applied by this Court, to deny review of Mrs. Kruse's claims and contentions of violation of her federal constitutional rights by the Court of Appeal.

2. To avoid the necessity for any appeal and petition for certiorari to the United States Supreme Court, by submitting one additional clarifying point of argument, to assure this Court that it has jurisdiction to review Plaintiff's federal constitutional claims and contentions, and is required under the United States Constitution to grant review and exercise that jurisdiction.

3. To respectfully suggest a procedure whereby this Court can grant review, do full justice between the parties, and perform its duty of supervision over the lower courts, to maintain public

confidence in the integrity and impartiality of the judiciary; but at the same time avoid publishing an opinion that reflects adversely on the Court of Appeal.

I

RULE 29 IS INVALID UNDER ARTICLE VI OF THE U.S. CONSTITUTION, IF APPLIED TO THIS CASE TO PRECLUDE GRANT OF REVIEW AND EXERCISE OF JURISDICTION:

In her Petition for Review (pp. 5-9, 12-21) and in her Reply to Answer to Petition (pp. 4-6) Mrs. Kruse claims violation by the Court of Appeal, of her constitutional due process and equal protection rights under the Fourteenth Amendment to the United States Constitution, and she further contends in her Reply that Article VI of the federal Constitution, as construed in decisions of the United States Supreme Court ("Supreme Court"), and the decisions of this Court in *Miller v. Municipal Court* (1943) 22 Cal.2d 818, makes it mandatory for this Court to grant review and exercise jurisdiction over her said claims and contentions of violation of her federal constitutional rights. In *Miller*, this Court holds that under the Supremacy Clause "it seems clear that a state court, *otherwise competent to exercise jurisdiction over the subject-matter*, the parties, and the amount in controversy, *must* assume jurisdiction of an action created by federal law . . ." (22 Cal.2d at 851, emphasis added).

Thus, Mrs. Kruse's contention that it is mandatory for this Court to grant review, is rested upon the basic premise that this Court *has jurisdiction over the subject-matter*, namely, jurisdiction to review the decision of the Court of Appeal, *on the ground* that the Court of Appeal reversed Mrs. Kruse's judgment in violation of her federal constitutional rights to a fair, just and impartial appellate review. Rule 29 does not list this as one of the grounds for review by this Court. Therefore, upon further reflection and research we believe it is necessary and proper to submit to this Court, the following additional argument to demonstrate that this Court does have jurisdiction to review on that ground, and that if Rule 29 were to be applied in this case to hold that

there is no jurisdiction to review the Court of Appeal decision, on that ground, then Rule 29 would be invalid because repugnant to the Supremacy Clause.

The first point to be noted is that *Miller v. Municipal* Court is not an isolated decision by this Court, but rather has been cited and followed by later decisions of this Court which uniformly recognize that it is *mandatory* for California State Courts to exercise jurisdiction over claims based upon the federal constitution or statutes. E.g. *Leet v. Union Pacific R.R. Co.* (1944) 25 Cal.2d 605, at 612-613:

> "... [T]he doctrine of *forum nonconveniens* is no justification for a state court to refuse jurisdiction of an action under the Federal Employers' Liability Act. Likewise, it is conclusive that the state court *must* take jurisdiction. It has no choice in the matter and no rule or policy on its part alters the situation." (Emphasis by the Court)

Accord: *McCarroll v. L.A. Carpenters* (1957) 49 Cal.2d 45, 61; *People Ex Rel Happell v. Sischo* (1943) 23 Cal.2d 478, 491 [California Constitution provisions inapplicable to extent conflict with federal constitution]; *Estate of Lindquist* (1944) 25 Cal.2d 697, 704-705.

The second point to be noted is that Article 6 § 12 of the California Constitution, as amended in 1984, provides in pertinent part as follows:

> "... (b) The Supreme Court may review the decision of a Court of Appeal *in any cause.*
> (c) The Judicial Council shall provide, by rules of court, for *the time and procedure ... for review ...*" (Emphasis added)

The just-quoted provisions of the California Constitution confer *unrestricted* and *unqualified* jurisdiction on this Court to "review the decision of a Court of Appeal in any cause." The authority conferred upon the Judicial Council to provide by rules of court for "the time and procedure for review," does not in any way limit or restrict the grant of substantive jurisdiction to review the decision of a Court of Appeal in any cause.

Rule 29 thus reflects a *rule of policy* adopted to *limit and restrict the exercise of jurisdiction*, to the three instances mentioned in Rule 29(a)(1), (2), and (3). But as held by this Court in *Miller* and *Leet, supra,* where the State Court (including this Court) has jurisdiction over the subject-matter, as it clearly does, then "the State Court *must* take jurisdiction. It has no choice in the matter and no rule or policy on its part alters the situation." (25 Cal.2d at 612-613) Thus this Court cannot by a rule of policy established in Rule 29 decline or refuse to exercise its jurisdiction to grant review and vacate the decision of the Court of Appeal, because it was reached and rendered in violation of Plaintiff's federal constitutional rights. If Rule 29 is applied in this case to deny review, then Rule 29 is invalid because in conflict with, and repugnant to, the Supremacy Clause.

The unique and distinguishing feature of this case, is that the federal question did not arise in the case presented in the Trial Court. Rather, the question of violation of the federal constitutional rights of Plaintiff arose for the first time in the Court of Appeal, from the conduct of that Court, in allegedly depriving Mrs. Kruse of her property (i.e., her $4 million judgment) without the due process of law and equal protection guaranteed under the Fourteenth Amendment. Thus, this Court is the sole and only California State Court of competent jurisdiction to review those federal constitutional claims, and vacate the Court of Appeal decision, if those claims are determined to be well-founded. Therefore, the Supremacy Clause mandates that this Court grant review and exercise jurisdiction to hear and determine those claims.

II

ONCE THIS COURT HAS GRANTED REVIEW ON ALL FEDERAL CONSTITUTIONAL ISSUES, ITS DECISION NEED NOT BE RESTED ON ALL GROUNDS, AND ITS DECISION NEED NOT REFLECT ADVERSELY ON THE COURT OF APPEAL:

For the reasons discussed above, this Court must grant review and exercise jurisdiction over *all* the federal constitutional issues

and claims raised by Plaintiff, as grounds for vacating and reversing the decision of the Court of Appeal. These are three in number. First, Plaintiff alleges a denial of due process by the Court of Appeal reviewing and reversing her judgment on legal issues and causes of action different from those pleaded and on which she recovered in the trial court. Second, Plaintiff alleges there was a denied of equal protection by the Court of Appeal not applying the standard rule of appellate review, to view the evidence in the light most favorable to Plaintiff's verdict and judgment. Third, Plaintiff alleges a denial of due process on the grounds that one or more of the Justices on the panel were in fact biased in favor of the Bank, or, alternatively, even if there was no actual bias in favor of the Bank, there was a reasonable appearance of such impropriety, so that one or more of the Justices was disqualified, and Plaintiff did not receive trial by a fair and impartial Court.

The three grounds are interrelated, but nevertheless separate and independent, and any one of the three is sufficient, by itself, as a ground for vacating and reversing the Court of Appeal decision. Moreover, a finding of proof of any one of the three grounds does *not* require a finding of any actual culpability or wrongdoing on the part of the Court of Appeal. Error on the part of Court of Appeal, in reviewing on theories different from those pleaded and recovered on in the trial court, is, in and of itself, without more, a denial of due process. Error on the part of the Court of Appeal in failing to view the evidence in the light most favorable to the judgment is, in and of itself, without more, denial of equal protection. Disqualification of one or more of the Justices on the ground of there being a reasonable appearance of bias in favor of the Bank is, in and of itself, without more, a denial of due process, and this is true even if there was in fact, no bias in favor of the Bank.

Accordingly, we submit that all of the claims of violation of federal constitutional rights, including that of actual bias in favor of the Bank, could be fully proved and established, from review of the existing record, and taking of evidence at an evidentiary hearing, after discovery to obtain evidence in admissible form to present at the evidentiary hearing; however, neither Plaintiff nor

her counsel, desire to achieve anything beyond vacating and reversal of the Court of Appeal decision, and the speediest possible disposition on the merits of the appeal and cross-appeals.

In summary, we respectfully submit that vacating and reversing of the Court of Appeal decision on the ground of error in allowing the mere reasonable appearance of bias in favor of the Bank, or error in reviewing on theories different than those pleaded in the trial court, or error in not viewing the evidence in the light most favorable to the judgment, would each and all be error warranting reversal of the decision of the Court of Appeal, which however would not demonstrate error any different from ordinary reversible error, and would not reflect any culpability on the part of any of the Justices.

Finally, we respectfully submit that the ends of justice would be best served by this Court reversing and vacating the decision of the Court of Appeal, and simultaneously, on its own motion, pursuant to Rule 27.5, transferring the cause to itself, and ruling on the merits of the appeal and cross-appeals, on the grounds that only in that manner can public confidence in the integrity and impartiality of the judiciary be maintained.

This is so, because if that is not done, and the appeals are remanded to a different division or a different district for review and decision, followed by possible grant of review by this Court, final disposition of the appeal and cross-appeals may require another year or two. In that event, Plaintiff who is now 73 years of age may not live to enjoy any of the benefits of her judgment, and may lose her family home in which she resides, because of the Federal District Court being unwilling to continue in effect its injunction against sale of her home as part of the bankruptcy proceedings of the O'Connell Company Corporation, which owns her family home. Public confidence in the integrity and the impartiality of the judiciary is not going to be furthered by subjecting Plaintiff to those hardships and injustices, even if the Court of Appeal decision were to be reversed on the grounds that there was a mere appearance of impropriety. By contrast, prompt resolution of the merits of the appeal and cross-appeals, by this Court, and a decision on the merits of a major lender liability case, by this Court, would reassure the public that this Court is

fully discharging its duty to monitor and supervise the lower courts to bring about the fair administration of justice in civil as well as criminal cases.

We have raised in Plaintiff's Reply, and expanded upon here, the fundamentally important and controlling point of mandatory grant of review by this Court, since we believed it was our duty to the client and to the Court, to do so. However, we recognize that counsel for the Bank may wish to respond, and we therefore respectfully request that the Court accept this Supplement for filing, and allow counsel for the Bank such response as is appropriate.

Respectfully submitted,

Lukens, Cooper, Perry &
Drummond

By: William M. Lukens

Frederick E. Watson
A Professional Corporation

By: Frederick E. Watson

FEW/jl
cc: All Counsel
Court of Appeal
Superior Court

APPENDIX R

Rule 23(b) of the California Rules of Court provides as follows:

> Proceedings for the production of additional evidence on appeal shall be in accordance with rule 41. The court may grant or deny the application in whole or in part, and subject to such conditions as it may deem proper. If the application is granted, the court, by appropriate order, shall direct that the evidence be taken before the court or a justice thereof, or before a referee appointed for the purpose. The court shall also prescribe reasonable notice of

> the time and place for the taking of the evidence and shall indicate the issues on which the evidence is to be taken. Where documentary evidence is offered, either party may submit the original or a certified or photostatic copy thereof and the court may admit the document in evidence and add it to the record on appeal.

Rule 29(a) of the California Rules of Court provides as follows:

> Review by the Supreme Court of a decision of a Court of Appeal will be ordered (1) where it appears necessary to secure uniformity of decision or the settlement of important

> questions of law; (2) where the Court of Appeal was without jurisdiction of the cause; or (3) where, because of disqualification or other reason, the decision of the Court of Appeal lacks the concurrence of the required majority of qualified judges.

Rule 41 of the California Rules of Court provides as follows:

> Except as otherwise provided in these rules, all motions in a reviewing court shall be made by the filing of a typewritten motion, with proof of service on all other parties, stating the grounds of the motion, the papers, if any, on which it is based, and

the order or other relief requested. Each copy of the motion shall be accompanied by a memorandum of points and authorities, and if the motion is based on matters not appearing of record, by affidavits or other evidence in support thereof. Any showing in opposition to the motion shall be served and filed within 10 days after the service of the motion.